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THE FUTURE OF CORPORATE AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT STATUTE: A ROADMAP

Andrei Mamolea*

INTRODUCTION

[In substance the growth of the law is legislative. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.]

The courts have long played an interstitial role in our system of government. The principles by which we are governed do not spring forth fully formed; instead, they are derived through careful analysis of fact, reasoned deliberation about the common good, judicious application of multiple bodies of law, and trial and error. The evolution of law governing domestic remedies for torts in violation of customary international law is an illustrative example. This

* Duke University School of Law, J.D. expected 2011; Cornell University, A.B. 2006. I would like to thank Jonathan Bush, William Casto, Christopher Ford, Mark Irvine, Chimène Keitner, Leigh Llewelyn, Almira Moronne, Michelle Phillips, David Riesenber, Matthew Smith, Kate Supnik and Ernest Young for reading and commenting on earlier versions of this Article.


3. William R. Casto, The New Federal Common Law of Tort Remedies for Violations of International Law, 37 RUTGERS L.J. 635, 639 (2006) ("Under this traditional dichotomy [between rights and remedies], the norm that is enforced in ATS litigation comes from international law and therefore is to a significant degree beyond the federal courts' lawmaking powers. . . . Sosa's pronouncement that the federal courts have discretion to create or deny a cause of action relates
much is clear: when Congress passed the Alien Tort Statute (ATS) as part of the Judiciary Act of 1789, it established a federal forum where foreigners could bring forth grievances stemming from violations against the law of nations. At the time of enactment, the ATS “enabled federal courts to hear claims in a very limited category.” Today, as a result of the growth of customary international law, the ATS furnishes a larger set of domestic remedies, though the precise number is hotly contested. The crux of the debate is thus over the role of the judiciary in crafting the gap-filling measures required to make the statute function as it was envisioned in 1789. What norms of customary international law provide domestic remedies under federal common law? How entrenched must an international norm be in order for the ATS to offer a remedy? What effect has Erie had on the statute? Sosa v. Alvarez Machain, the only significant pronouncement by the Supreme Court to date on the ATS, was supposed to address these preliminary questions. Yet it offered no clear answers.

This Article does not aim to add to the voluminous debate between supporters and detractors of the ATS, nor does it aim to the remedy rather than the norm.

4. 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

5. Id. Customary international law (CIL) and the law of nations are used interchangeably throughout this Article.


7. See In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 248 (S.D.N.Y. 2009) (“[T]he number of torts that violate the law of nations has increased, and Congress has erected no barrier to their recognition under the [ATS].”); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, 120 HARV. L. REV. 869, 895 (2007) (“[N]either Erie nor Congress ha[s] categorically prohibited the judicial recognition of claims under CIL.”).

8. In Sosa, the Court held that “Erie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.” Sosa, 542 U.S. at 729–30 (citations and footnotes omitted). See also Craig Green, Repressing Erie’s Myth, 96 CALIF. L. REV. 595, 623–55 (2008); William S. Dodge, Customary International Law and the Question of Legitimacy, 120 HARV. L. REV. F. 19 (2007). But see Sosa, 542 U.S. at 744–46 (Scalia, J., concurring in part and concurring in judgment).

to resolve the incorporation debate. Instead, it offers something simpler yet more essential: a roadmap for the Court to follow in answering the most pressing issues. Are corporations liable under the ATS? Does corporate liability under the ATS conflict with international law? What body of substantive law should courts apply, especially when adjudicating alien tort claims arising under the aiding and abetting theory of liability? Finally, what are the policy implications of ATS litigation? The Sosa Court relegated most of these concerns to a cryptic footnote and otherwise left them unanswered.10 Taken together, these questions help identify the limits imposed by customary international law and by Sosa on the federal courts regarding corporate aiding and abetting liability.

Recent developments have made these questions especially timely. On September 10, 2009, the Second Circuit requested briefing on the subject of corporate liability under the ATS.11 Less than a month later, in Presbyterian Church of Sudan v. Talisman Energy, Inc., the Second Circuit held that according to international law the "mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."12 International law scholars vehemently denounced this decision and the Supreme Court was widely expected to address the issue before the Presbyterian Church of Sudan filed for certiorari.13 That is

10. Id. at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 791–795 (CADC 1984) [sic] (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with Kadic v. Karadžić, 70 F. 3d 232, 239–241 (CA2 1995) [sic] (sufficient consensus in 1995 that genocide by private actors violates international law").


12. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

because on November 2, 2009, the Supreme Court invited the Solicitor General to submit a brief in Pfizer, Inc. v. Abdullahi. Had the Court taken up this case, it would have confronted all four questions addressed in this Article. Underpinning the system of judicial lawmaking is the effective resolution of these kinds of questions by the highest court. On June 29, 2010, however, following the advice of the Solicitor General, the Court denied certiorari and missed a prime opportunity to clarify the law. Recent developments in Presbyterian Church of Sudan v. Talisman Energy underscore that the questions raised in Pfizer will persist until resolved by the Court.

On April 15, 2010, Presbyterian Church of Sudan filed a petition for certiorari, challenging the Second Circuit’s mens rea standard for aiding and abetting under the ATS. Talisman Energy responded by filing a conditional cross-petition for certiorari on the issues of corporate liability and extraterritoriality. Thus, the Court was again confronted with all four questions that make up this Article’s inquiry. Unfortunately, the literature has so far approached these issues in a manner that is confused, piecemeal, and often wrong. These questions cannot be viewed separately. A holistic approach to the ATS is needed to serve as a springboard for a deeper inquiry into the relationship between international legal norms and the federal common law.

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15. Id.


17. Id.


19. On October 4, 2010, the Court denied certiorari to both petitions.
This Article proceeds as follows: Part I reviews the complicated history of the ATS and explains why the Court must revisit many of the issues in Sosa. Part II examines corporate liability under the law of nations and argues that corporations may be liable under the ATS. Part III explains how the ATS is jurisdictionally compatible with international law. Part IV offers a corrective to the common choice of law mistakes made during ATS adjudication. Part V argues that Pfizer v. Abdullahi was a missed opportunity to clarify corporate aiding and abetting liability under the ATS. Part VI delves into the certiorari briefs submitted in Presbyterian Church of Sudan v. Talisman Energy. Finally, Part VII shows why concern over the alleged harms of ATS litigation is vastly exaggerated.

I. THE HISTORY AND PURPOSE OF THE ALIEN TORT STATUTE

A. Origins

Much of the confusion surrounding the ATS is the result of the statute's unique history. Although legislative history is scarce, it appears that this law was in no small measure a response to the Marbois Affair. In May 1784, the French Consul General to the United States, François Barbé-Marbois, was assaulted by a fellow Frenchman on the streets of Philadelphia. The assailant was tried and convicted in a Pennsylvania court for violating the law of nations. “This law,” Chief Justice M’Kean affirmed, “in its full extent, is part of the law of this State.” Indeed, customary international law had always been part of common law.

The Continental Congress had previously issued a non-

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21. Id. at 111.
22. Id. at 116. As courts of general jurisdiction, state courts have always been open to hear these types of claims.
23. See 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67 (noting that the law of nations is “adopted in it's [sic] full extent by the common law, and is held to be part of the law of the land”); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement”); 1 Op. Att’y Gen. 27 (1792) (“The law of nations, although not specifically adopted by the Constitution or any municipal act, is essentially a part of the law of the land”). See also 1 James Wilson, Of the Law of Nations, in THE WORKS OF JAMES WILSON 128, 128–58 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).
binding resolution calling on states to "provide expeditious, exemplary, and adequate punishment" for infractions of international law, but the Marbois Affair underscored the dangers in leaving sensitive diplomatic matters to the states. As the Court has since recognized, "rules of international law should not be left to divergent and perhaps parochial state interpretations." When Congress passed the Judiciary Act of 1789, it created "no new causes of action," but merely established a federal forum where foreigners could bring grievances for violations of the law of nations.

B. Rebirth

Prior to Filártiga v. Peña-Irala, federal courts had adjudicated only two cases under the ATS. Filártiga opened the door for international human rights litigation in U.S. courts. Yet even as the lower courts have struggled to interpret this ancient statute, the Supreme Court has been reluctant to intercede. To date, its only significant pronouncement is Sosa v. Alvarez-Machain, a cautious decision that has produced multiple interpretations and little consensus on fundamental questions. In the words of one

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24. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136 (Gaillard Hunt eds., Washington Gov't Printing Office, 1912) (referring specifically to "the violation of safe conducts or passports, . . . of hostility against such as are in amity, . . . infractions of the immunities of ambassadors and other public ministers").

25. The Founders also addressed the Marbois Affair through the Constitution's define and punish clause and the 1790 Crimes Act. U.S. CONST. art. I, § 8, cl. 10; Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. This and other episodes contributing to the genesis of the ATS suggest the statute was designed to eliminate friction with other states. Yet the language of the statute also suggests that the Founders intended to make remedies for violations of the law of nations broadly available to all aliens. Courts must balance these two competing values.


27. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). The Alien Tort Statute "was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." Id. at 714.

28. 630 F.2d 876 (2d Cir. 1980).


30. In Filártiga, the Second Circuit held the defendant liable under the ATS for torture committed abroad. 630 F.2d at 878.

31. The Court held "that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." Sosa, 542 U.S. at 738.
noted scholar, "Justice Souter's majority opinion in Sosa v. Alvarez-Machain has become something of a Rorschach blot, in which each of the contending sides . . . sees what it was predisposed to see anyway."\textsuperscript{32} Yet even this pithy observation fails to capture the variety of interpretations spawned by Sosa. For example, Judge William Fletcher endorsed the Revisionist\textsuperscript{33} historical account in full, but nevertheless concluded that Sosa "implies that the federal common law of customary international law is jurisdiction-conferring."\textsuperscript{34} These debates affect our inquiry into corporate aiding and abetting liability only insofar as they obscure two important standards set up by the Court. That Sosa endorsed a system of judicial lawmaking is undeniable. Yet in order to ascertain the purpose of this system and the breadth of judicial discretion granted to the lower courts, these standards must be clarified.

The first standard concerns jurisprudential limits on the ability of the courts to recognize new remedies based on customary international law. The Revisionists contend that to accommodate the ATS in a post-Erie world, the Court adopted an improper construction of the statute authorizing the judicial creation of domestic remedies.\textsuperscript{35} Essentially, they argue that the Court attempted to "translate" the First Congress's "expectations about the effect of the ATS, which rested on a pre-Erie understanding of general common law, into the contemporary context in which federal courts apply nonstate common law only in specialized circumstances."\textsuperscript{36} They then point to a "tension, if not outright contradiction, in the Court's construction of the ATS as both purely jurisdictional and an authorization for creating causes of action."\textsuperscript{37} Other scholars have charged that "this tension is of [the Revisionists'] own making and vanishes once one accepts,\textsuperscript{32, 33, 34, 35, 36, 37}
as the *Sosa* Court did, that congressional authorization is unnecessary because customary international law is already part of the U.S. legal system.\textsuperscript{38} These other scholars interpret *Sosa* to mean that "*Erie* and other changes in domestic and international law are prudential considerations—"reasons . . . for caution"—not requirements that may override the original understanding."\textsuperscript{39} In contrast, the Revisionists consider the common lawmaking powers of the courts constrained by Congress’s original intent to furnish jurisdiction for a relatively modest set of actions and by what they construe as a three-pronged *Erie* test.\textsuperscript{40} The other scholars point out that this interpretation is plainly contradicted by the language of the decision. The Court held that lower courts possess "a substantial element of discretionary judgment" and that "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."\textsuperscript{41} Nor is it reasonable to infer that Justice Souter’s passing mention of "a series of reasons [that] argue for judicial caution" amounts to a test—rather than a list of prudential considerations.\textsuperscript{42} Whichever interpretation ultimately prevails, it remains the case that under the *Sosa* system, the lower courts possess substantial powers to recognize domestic remedies for violations of international law.

The second standard concerns the violations of customary international law that can be brought before a federal court under the ATS.\textsuperscript{43} In *Sosa*, the Court held that the cause of

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\item \textsuperscript{38} Dodge, *supra* note 8, at 21.
\item \textsuperscript{39} *Id.* (quoting *Sosa* v. Alvarez-Machain, 542 U.S. 692, 725 (2004)).
\item \textsuperscript{40} Bradley et al., *supra* note 7, at 878–81. The Revisionists claim federal common law must 1) have some federal law basis; 2) fill in the gaps of federal statutory or constitutional regimes; and 3) reflect the policy choices of existing federal law. *Id.* The Second Circuit has rejected this reading of *Sosa*. See Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254, 268 (2d Cir. 2007) (Judge Katzmann did “not read *Sosa* as requiring that a court individually analyze each of the five reasons.”). Souter listed five, rather than three, reasons for caution. *Sosa*, 542 U.S. at 725–728.
\item \textsuperscript{41} *Sosa*, 542 U.S. at 726, 729.
\item \textsuperscript{42} *Id.* at 725.
\item \textsuperscript{43} Under the ATS not all customary international law is actionable. Certain norms are not sufficiently entrenched to support an alien tort claim. *See*, e.g., Aldana v. Fresh Del Monte Produce, 416 F.3d 1242, 1247 (11th Cir. 2005) (following *Sosa* in holding that the International Covenant on Civil and Political Rights did not “create obligations enforceable in the federal courts”);
action must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms we have recognized." The meaning of this standard has also engendered disagreement. Revisionists contend that the test is stricter than those previously employed by the lower courts. This does not comport with evidence presented by Professor Beth Stephens that the requirements of "clear definition" and "general assent of civilized nations" were first employed in Filártiga. Casting further doubt on the Revisionist interpretation, Professor William S. Dodge has demonstrated that this second requirement simply defines customary international law.

Both elements of this standard appear to be the product of judicial prudence rather than substantive constraints. The rationale behind this judge-made rule is that the "general practice has been to look for legislative guidance before exercising innovative authority over substantive law." Customary international law, however, provides "judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for

Ralph G. Steinhardt, Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts, 57 Vand. L. Rev. 2241, 2283 (2004) (criticizing Sosa for returning "to a conception of the [Universal Declaration of Human Rights] that is anachronistic by several decades, inconsistent with the Court's precedent, and contrary to the favorable invocation in Filártiga, which had considered the Declaration authoritative if non-binding evidence of a widely accepted norm.").

44. Sosa, 542 U.S. at 724–25.

45. Bradley et al., supra note 7, at 897.


This cautious approach mirrors that applied by most of the lower courts considering ATS claims before Sosa. The Court recognized this, citing with approval the key lower court decisions defining the reach of the ATS. Filártiga held that an actionable norm under the ATS must "command the 'general assent of civilized nations'" and be capable of "clear and unambiguous" definition.

47. William S. Dodge, Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain, 12 Tulsa J. Comp. & Int'l L. 87, 99 (2004) (adding "it is not clear whether these modern developments impose additional limitations on the ATS or simply reinforce its inherent limitations").

48. Sosa, 542 U.S. at 726.
International norms provide a built-in rationale for applying certain substantive law, rebutting the traditional presumption against judicial discretion in the area of foreign affairs. As a result of such safeguards, "the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." This standard is a judicially self-imposed restraint. Still, as Justice Story once noted, "it does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations." This theory of the federal courts influenced the Court to leave the door open to a narrow class of international norms.

C. Future

Thus, a certain degree of indeterminacy persists, allowing courts to experiment. In *Filártiga*, the Second Circuit noted that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." The *Sosa* court echoed this sentiment, declaring "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." Today, courts recognize genocide, certain war crimes, piracy, slavery, forced labor, and aircraft hijacking as violations of international law that do not require state

52. Filártiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
53. Sosa, 542 U.S. at 729. The *Sosa* Court rejected the argument, first articulated by Judge Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), that the Alien Tort Statute required a separate congressional authorization, calling this thesis implausible. *Sosa*, 542 U.S. at 731. The Court also gutted the claim that actionable norms must share all of the historical characteristics of the three original violations. See id. at 732 (citing *Filártiga*, 630 F.2d at 890). See also Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 23–26 (2007). Under the ATS, courts apply international law not as it existed in the eighteenth century, but as it is understood today.
54. The ATS only requires the violation of an international norm—a point often lost on foreign scholars. See, e.g., Brief of Amici Curiae International Law
action. Sosa gave the lower courts significant discretion in deciding what remedies should be available for a cognizable international norm. The judicial modesty exercised by the Court, however, has been a double-edged sword. Though it welcomed "congressional guidance," none has been forthcoming. Meanwhile, there is mounting pressure from the lower courts for clearer guidelines to this burgeoning field of litigation. Sosa cries out for clarification.

One element of the Sosa system that requires clarification is which body of law governs an entity's liability. If federal common law applies, there is no doubt corporations can be haled into court under the ATS. Corporate liability is well grounded in this body of law. Consequently, Part II is designed as an argument in the alternative. Even if the Court were to decide that international law governs entity liability, corporations could still be held responsible under the ATS.

Professors in Support of Defendants-Appellees, Sarei v. Rio Tinto, No. 09-56381 (9th Cir. Dec. 24, 2009). The violation need not rise to the level of an international crime. Sosa, 542 U.S. at 731. This has always been the case. See Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). For example, when Filârtiga was decided, torture was universally prohibited, but not an international crime. Filârtiga, 630 F.2d at 884. In sum, "sources of international law that cannot alone establish torts are still 'potent authority for universal acceptance' of a norm." In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 249 n.89 (S.D.N.Y. 2009) (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 180 (2d Cir. 2009)).


56. Sosa, 542 U.S. at 726.

57. Id. at 731.


II. THE LIABILITY OF CORPORATIONS UNDER CUSTOMARY INTERNATIONAL LAW

Private liability exists under customary international law. The notion that the law of nations governs only relations between States is of relatively recent provenance. The Founding Fathers believed that individuals had rights and duties under the law of nations. In *Henfield's Case*, James Wilson held that “[o]n states as well as individuals the duties of humanity are strictly incumbent.” In his landmark treatise, Henry Wheaton noted that “[p]rivate individuals, or public and private corporations may . . . become the subjects of this law in regard to rights growing out of their international relations with foreign sovereigns and states, or their subjects and citizens.” Thus, when international bodies began to codify individual responsibility during the first half of the twentieth century, they were not so much

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60. Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 YALE L.J. 60, 74 (1949) (arguing against the “nineteenth century canards that international law is the law of states and their relations to each other, with all enforcement and negotiations in the states alone”).

61. They drew heavily from Blackstone who recognized private international law—such as law merchant—as part of municipal law. *See Blackstone, supra* note 23, at *67–73. “[I]n vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion . . . .” Id. at *68. Citing Blackstone in *Sosa*, Justice Souter specifically referred to “rules binding individuals for the benefit of other individuals” which “overlapped with the norms of state relationships.” *Sosa*, 542 U.S. at 715 (citing *Blackstone, supra* note 23, at *68). *See also* Wilson, *supra* note 23, at 138 (“Thus the law of natural equality, which prohibits injury and commands the reparation of damage done; the law of beneficence and of fidelity to our engagements, are laws respecting nations, and imposing, both on the people and on their respective sovereigns, the same duties as are prescribed to individuals.”) (quoting JEAN-JACQUES BURLAMAQUI, *PRINCIPES DU DROIT POLITIQUE* 121 (Nugent, trans., 4th ed., 1792)).

62. *Henfield's Case*, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6,360) (recognizing pre-existing private duties under international law).

As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed.

*Id.* at 1120.

expanding the bailiwick of international law as they were returning to more ancient understandings about the nature of individual responsibility. Individual command responsibility for crimes against humanity emerged as a principle of customary international law during the 1919 deliberations of the Commission on Responsibility and Sanctions. This responsibility was ultimately codified during the Second World War in Control Council Law No. 10, which recognized private individual and corporate liability, as well-


[It is clear that the draftsmen did not intend to exclude criminal corporations from its scope. For example, Art. 1 of the quadrapartite agreement provides for the trial of war criminals, “whether they be accused individually or in their capacity as members of organizations or groups or in both capacities”. Here the word “individually” is clearly intended to contradistinguish “representative” liability. Certainly, it is not used to distinguish “individual” from “corporate” liability.

Id. That corporations are legitimate legal entities made no difference. I.G. Farben was subject to international law not as a criminal organization (like the Gestapo) but because it had violated international law. See Bush, supra note 65, at 1098 (noting that only individuals were charged at the Nuremberg trials and “[o]ccasional suggestions to the contrary by human rights scholars are mistaken”). But see Kendra Magraw, Universally Liable? Corporate-Culplicity Liability Under the Principle of Universal Jurisdiction, 18 MINN. J. INT'L L. 458, 470 (ignoring Control Council Law No. 10 in arguing that “the Nuremberg Tribunals only had the jurisdiction to try individuals”); Harold Hongju Koh, Separating Myth from Reality About Corporate Responsibility Litigation, 7 J INT'L ECON. L. 263, 266 (2004) (confusing two different tribunals in arguing that “the Nuremberg Charter permitted prosecution of a private group or organization” such as Flick, I.G. Farben and Krupp); Andrew Clapham, The Question of Jurisdiction Under International Criminal Law Over Legal Persons, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 170–171 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (arguing the *Farben judgement can be read as implying that the Farben company itself had committed the relevant war crime, even though the Tribunal had no jurisdiction
entrenched elements of international law.

A. From Nuremberg . . .

The military tribunals at Nuremberg played a central role in clarifying private liability under customary international law. These tribunals had jurisdiction over corporations, but, for reasons of legal and political expediency, none were ever charged. Initially, the chief obstacle to trying the German corporations was the “particularly complicated governance structure[s]” of large cartels like I.G. Farben. As relations among the Allies deteriorated during the trials, British and American lawyers also developed concerns about the political effects of holding German corporations liable for their crimes. Nonetheless, during the trials of individual industrialists the tribunals “routinely spoke in terms of corporate responsibilities and obligations.”

In United States v. Krauch, for example, the tribunal referred to “a juristic person” that acquired private property “against the will and consent of the former owner.” Judge Hebert wrote of “action on the part of Farben [which] constituted a violation of the Hague Regulations.”

Endorsing the view that the “concept of corporate liability for jus cogens violations has its roots in the trials of German war criminals after World War II,” the Southern District of New York has recognized that the tribunals talked in terms of

over Farben as such”). The tribunal had jurisdiction over corporations.

67. Bush, supra note 65, at 1094–95 (“[C]riminal charges against corporations were considered entirely permissible, though ultimately not used.”).

68. Id. at 1170.

69. Donald Bloxham, “The Trial that Never Was”: Why There Was No Second International Trial of Major War Criminals at Nuremberg, 87 J. HIST. 41, 51 (2002) (“Jackson went on to express the fear that attacking industrialists would ‘tend to discourage industrial co-operation with our Government in maintaining its defences [sic] in the future while not at all weakening the Soviet position, since they [did] not rely upon private enterprise.’” (quoting Robert H. Jackson, Final Report to the President Concerning the Nurnberg War Crimes Trial (1946)), reprinted in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 277 (1949)).


71. 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1132 (1948) [hereinafter T.W.C.].

72. Id. at 1081, 1140.
“Farben’s . . . activities, . . . offenses against property” and crimes “committed by Farben, and . . . action[s] of Farben.”73 Similarly, in United States v. Krupp, the tribunal held that the confiscation and use of a French factory “by the Krupp firm constitute[d] a violation of Article 43 of the Hague Regulations . . . [and] the Krupp firm, through defendants . . . voluntarily and without duress participated in these violations.”74 The firms in turn acted as if they were on trial. Rather than distance itself from the proceedings, I.G. Farben provided essential resources, including attorneys, specialists, and expert accountants, to defend the firm’s conduct and that of the officers on trial.75

The individual prosecutions of various industrialists removed all doubt about private liability under customary international law.76 “Where private persons, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law.”77 Shifting its gaze beyond individual complicity, the American tribunal held in Wolheim v. I.G. Farben that “the fundamental principles of equality, justice and humanity must have been known to all civilized persons, and the I.G. Corporation cannot evade its responsibility any more than can an individual.”78

The emerging consensus after Nuremberg was that juridical personhood under international law extended to natural and legal persons.79 “[C]orporations or partnerships,”
Philip Jessup remarked, "may also be subjects of international law." Some, like Hersch Lauterpacht, went even further, arguing that

the individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being and the dignity of the individual human being are a matter of direct concern to international law.

Though these duties remained unenforceable for much of the next sixty years, they were not diminished.

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82. Nicola Jägers, Corporate Human Rights Obligations 38 (2002) ("The absence of direct enforcement for private parties at the international level does not necessarily bar horizontal effect; it merely means that the enforcement of the obligations for non-State entities is indirect . . . ."); Volker Nerlich, Core Crimes and Transnational Business Corporations, 8 J. Int'l L. 895, 895 (2010) ("While currently there is no international court or tribunal that can exercise criminal jurisdiction over private legal persons for core crimes, this does not mean that the prohibitions underlying these crimes are not binding on transnational business corporations.")
Corporations are subject to international law even when no forum exists to prosecute them. Obligations exist even in the absence of international enforcement mechanisms, which, in any case, have "never been the linchpin of the obligation itself." The fact that private individuals may not be currently haled before the International Court of Justice says nothing about private liability under international law.

Though they lack the full set of legal rights enjoyed by states, like the ability to bring a claim before the ICJ, persons are nonetheless liable for violations of international law, which can be remedied in domestic courts. These national courts, in turn, have broad discretion regarding the rules of decision and liability when enforcing international obligations. It was this consensus that led the Second Circuit to reject the argument that international law binds "only states and persons acting under color of a state's law, not private...


85. See Statute of the International Court of Justice art. 34(1); Barcelona Traction, Light & Power Co., Ltd. (Second Phase) (Belg. v. Spain), 1970 ICJ REP. 3 (Feb. 5). Suffice it to say that Barcelona Traction does not foreclose jurisdiction over a corporation on a base other than nationality. But see Ku, supra note 84, at 22. International law of jurisdiction recognizes no accepted test for corporate nationality and makes no distinction between corporations and individuals. See Barcelona Traction, 1970 ICJ REP. at 42 (“In allocating corporate entities to States for purposes of diplomatic protection, international law is based... on an analogy with the rules governing the nationality of individuals... [I]n the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one state have had to be weighed against those of another.”). Thus, even if application of the ATS were considered an exercise in diplomatic protection, which it most assuredly is not, international law would not foreclose jurisdiction over foreign corporations. Since the ATS is a form of adjudicatory jurisdiction, Barcelona Traction is of no relevance, except, perhaps, in its discussion of erga omnes norms. See id. at 32; see also infra Part III.

86. CLAPHAM, supra note 79, at, 59–83; Clapham, supra note 83, at 27.

87. See Kadic v. Karadžić, 70 F.3d 232, 246 (2d Cir. 1995) ("The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations."); Eileen Denza, The Relationship Between International Law and National Law, in INTERNATIONAL LAW 415, 415 (Malcolm D. Evans ed., 2003) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level.").
International law leaves a great deal of discretion to national courts regarding rules of decision and liability.

Faced with this overwhelming consensus, opponents of ATS litigation have resorted to dusting off venerable, yet badly outdated, treatises like Oppenheim's *International Law.* In lines that have scarcely changed since 1905, Professor Oppenheim informs us that, "the subjects of the rights and duties arising from international law are states solely and exclusively." Today, however, private criminal liability is uncontroversial and the debate has shifted to what is now the perennial question: which courts are best suited to prosecute corporations for violations of international law? Are they international tribunals or should this task be left to domestic courts? The drafters of the Rome Statute, for example, agreed to set these corporate cases outside of the jurisdiction of the International Criminal Court (ICC). Yet this decision does not indicate that corporations are not liable under international law, as some commentators have claimed. It merely suggests that the drafters believed jurisdiction over corporations would detract from the limited focus of the ICC. As even a cursory reading reveals, the Rome Statute by its own terms neither reflects nor sets out customary international law. One simply cannot assume

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88. Kadic, 70 F.3d at 239.
89. See Ku, supra note 84, at 21–22.
90. Id. (citing 1 OPPENHEIM'S INTERNATIONAL LAW 16 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)). The only difference here between the First and Ninth editions is the substitution of the phrase "international law" for "law of nations." See LASSA OPPENHEIM, INTERNATIONAL LAW 341 (1st ed. 1905). The excerpt is also inconsistent with later revisions made by Lauterpacht in LASSA OPPENHEIM, 1 INTERNATIONAL LAW 639 (8th ed. 1955) ("[V]arious developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of international law.").
91. Clapham, supra note 66, at 139–196.
93. Compare Ku, supra note 84, at 28, with Andrew Clapham, supra note 66, at 191 ("No delegation challenged the conceptual assumption that legal persons are bound by international criminal law.").
95. See Rome Statute of the International Criminal Court, art. 10, July 17, 1998, 2187 U.N.T.S. 3 ("Nothing in this Part shall be interpreted as limiting or
that the purview of international courts encompasses all international law. It bears repeating: corporations are subject to international law even when no international forum exists to prosecute them.\textsuperscript{96} Focusing on international tribunals also obscures the significant advances domestic courts have made to enforce international law. Some commentators have doubted whether “there are any material examples outside the United States of national courts imposing criminal liability on corporations for international law violations.”\textsuperscript{97} In fact, laws imposing criminal liability on corporations for violations of international law are widespread.\textsuperscript{98} The point would be moot, however, even if there was no such domestic practice in foreign states. It is a well-established rule of international law that the presence or absence of widespread domestic legal practice does not necessarily give rise to a rule of customary international law.\textsuperscript{99}

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\textsuperscript{96} See supra notes 82–87 and accompanying text.
\textsuperscript{99} See \textit{International Law Association, Report of the Sixty-Ninth Conference} 720 (2000) (citing Tunis and Morocco Nationality Decrees (U.K. V. Fr.) 1923 PCIJ (ser. B) No. 4, at 24 (Feb. 7)). International law defers to domestic law on questions of an entity's liability and Sosa's universality requirement is limited to the violated norm. See supra notes 54 and 87. That is why the European Commission acknowledged that “a subset of norms that
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Despite this wealth of evidence, a few respected scholars maintain that there are no "accepted rules or standards for corporate criminal responsibility under international law."^{100} These arguments have been rejected when introduced as expert testimony in the lower federal courts. "Limiting civil liability to individuals while exonerating the corporation directing the individual's action," Judge Weinstein noted, "makes little sense in today's world."^{101} Although Professor James Crawford's argument is much more subtle than those that flatly deny the existence of private individual liability,^{102} it relies on a fundamental assumption that the lower courts have deemed unwarranted: that the accepted standard for private liability does not cover corporate liability. The courts have not supported this assumption. In an early round of

make up customary international law apply to non-state actors, such as corporations." Brief of European Commission as Amicus Curiae in Support of Neither Party at 4, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339). It is also why in Balintulo v. Daimler AG, the German government explicitly noted that it argued that the "Plaintiff's claim against Daimler should be heard in Germany, not that corporations cannot be held accountable for these claims." Brief of Amici Curiae International Law Scholars in Support of the Plaintiffs-Appellees, Balintulo v. Daimler AG, at 15, No. 09-2778-cv (2d Cir. Dec. 22, 2009) (citing Letter from German Government, at 1 (Oct. 8, 2009)).

100. Declaration of James Crawford at 11, Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (No. 01-cv-9882); see also In re Agent Orange Prod. Liab. Litig. 373 F. Supp. 2d 7, 55 (E.D.N.Y. 2005) (rejecting the argument that international law "does not, in the context of international criminal law or elsewhere, impose obligations or liability on juridical actors or artificial persons such as corporations") (citing Declaration of Kenneth Howard Anderson Jr. at 45, In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 55 (E.D.N.Y. 2005) (No. 04-CV-400).


102. Compare Declaration of Christopher Greenwood at 6, Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (No. 01-cv-9882), and Brief of Amicus Curiae Professor Christopher Greenwood, CMG, QC in Support of Defendant-Appellee, Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244 (2d. Cir. 2009) (No. 07-cv-0016), with U.N. Intl Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 58, in Report of the International Law Commission to the General Assembly, 56 U.N. GAOR, Supp. (No. 10) at 383, U.N. Doc. A/56/10 (Nov. 2001) (“These articles are without prejudice to any question of the individual responsibility under international law . . . .”). See also JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 312 (2002) (“If it is not excluded that developments may occur in the field of individual civil responsibility. As a saving clause article 58 is not intended to exclude that possibility; hence the use of the general term ‘individual responsibility.’”).
proceedings against Talisman Energy, Judge Schwartz held that “corporations may also be held liable under international law, at least for gross human rights violations.” \(^\text{103}\) In \textit{Sarei v. Rio Tinto}, the Ninth Circuit similarly concluded that corporations could be held vicariously liable for violations of \textit{jus cogens} norms. \(^\text{104}\) Even the Eleventh Circuit has noted that corporations may be liable for aiding and abetting violations of international law. \(^\text{105}\) Indeed, only one case has ever been outright dismissed under the theory that corporations are not liable under the ATS. \(^\text{106}\) That court erred in asserting that a crime against humanity can only be committed by “a State or State-like organization.” \(^\text{107}\) Not even Professor Crawford would endorse this reading of the law. \(^\text{108}\)

Most courts have followed the Second Circuit, which has “repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be.” \(^\text{109}\) From Nuremberg to the Southern District of New York, courts have consistently affirmed that private liability exists in customary international law.

That all changed on September 17, 2010 when the Second

\(^\text{103}. \textit{Presbyterian Church}, 244 F. Supp. 2d at 319 (adding that a “private corporation is a juridical person and has no per se immunity under U.S. domestic or international law.”).

\(^\text{104}. \textit{Sarei v. Rio Tinto}, PLC., 487 F.3d 1193, 1202–03 (9th Cir. 2007).

\(^\text{105}. \textit{See}, \textit{e.g.}, \textit{Sinaltrainal v. Coca-Cola Co.}, 578 F.3d 1252 (11th Cir. 2009); \textit{Romero v. Drummond Co., Inc.}, 552 F.3d 1303 (11th Cir. 2008).


\(^\text{107}. \textit{Abagninin}, 545 F.3d at 741.


\(^\text{109}. \textit{In re S. African Apartheid Litig.}, 617 F. Supp. 2d at 250, 254 (S.D.N.Y. 2009) (“On at least nine separate occasions, the Second Circuit has addressed [ATS] cases against corporations without ever hinting—much less holding—that such cases are barred.”).
Circuit held, in *Kiobel v. Royal Dutch Petroleum*, “that corporate liability is not a discernable—much less universally recognized—norm of customary international law.” This conclusion is based on several unwarranted assumptions that deserve close scrutiny.

C. What International Law is Not

The Second Circuit’s decision in *Kiobel* betrays a profound ignorance about the nature and historical development of international law. It stands athwart precedent, evidence, and logic. Judge José Cabranes was responsible for writing the majority opinion, which was joined by Chief Judge Jacobs. Judge Pierre Leval concurred with the decision, “but not on the basis of the supposed rule of international law the majority has fashioned.” This observation gets to the heart of the problem. Judge Cabranes’s majority opinion manufactures rules that have no basis in international law, and misstates international jurisprudence. Unfortunately, the sheer volume of misinformation makes this an especially difficult case to analyze: there is no obvious rubric. To understand this decision, one must reconstruct the development of international law, starting with the most basic error.

Judge Cabranes misstates the relationship between obligation, liability, and enforcement in international law. Throughout the majority opinion he assumes that international enforcement is a prerequisite to the emergence of an obligation under customary international law. This leads to a single-minded focus on enforcement, rather than on obligation, most readily apparent when he addresses Judge Leval’s claim that customary international law consists of


112. *See infra* notes 114–130.

113. *See infra* notes 138–149.

established "norms of prohibited conduct" and "says little or nothing about how those norms should be enforced." Judge Cabranes argues that "under Judge Leval’s approach Nuremberg was not a detectable advance of international law. That is because, in his view, international law merely 'establishes[s] . . . norms of prohibited conduct' and leaves individual States to determine the scope of liability." In responding to Judge Leval, Judge Cabranes equates liability with enforcement positing that "[b]efore the Second World War, international law provided few protections of the human rights of individuals." Judge Cabranes believes this fact is meaningful, and that enforcement creates liability and obligations. This approach finds no support in international law. In fact, the opposite is true. Obligations create liabilities, which then may be enforced under customary international law.

The Nuremberg trials did not extend the scope of liability to individuals. Not only did these obligations predate any international enforcement mechanism, but they also informed national trials of individuals for violations of international law. It is simply not true that international law imposed no obligations on individuals prior to Nuremberg. Nor is it the case that national courts never before enforced these obligations. The Leipzig and Constantinople trials in the aftermath of the First World War are two prominent examples. The Nuremberg trials were exceptional because

115. Id. at *27.
116. Id. at *8, n.29 (citing Kiobel, 2010 WL 3611392, at *27 (Leval, J., concurring)).
117. Id. at *13, n.36 (emphasis added).
118. Robert McCorquodale, The Individual and the International Legal System, in INTERNATIONAL LAW, supra note 87, at 307 (“Prior to [the enforcement of individual responsibility through international tribunals], the individual responsibility still existed, and was occasionally enforced in national courts, even though no international judicial body enforced it . . . . The responsibility arose through customary international law . . . .”).
119. Cabranes’s citation to Justice Jackson underscores this point: “As Justice Jackson explained, the London Charter ‘is a basic charter in the International Law of the future,’ and the Nuremberg trials took great strides in ‘mak[ing] explicit and unambiguous’ the human rights norms that had ‘theretofore . . . [been] implicit in International Law.’” Kiobel, 2010 WL 3611392, at *13 (citing Robert H. Jackson, Justice Jackson’s Final Report to the President Concerning the Nurnberg War Crimes Trial, 20 TEMP. L.Q. 338, 342 (1947)).
120. ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH
they represented the first time an international court exercised jurisdiction over persons. The limit of an international court's jurisdiction does not define the limits of liability. They are questions of entirely different bodies of substantive law. Scholars have repeatedly noted that international enforcement mechanisms have "never been the linchpin of the obligation itself."¹²¹ The existence of a "rule of substantive international law providing for the punishment of legal persons for core crimes" does not depend on whether an international mechanism has jurisdiction.¹²² Indeed, corporations are subject to international law even when no forum exists to prosecute them, and they may be held liable in domestic courts. These courts, in turn, can apply the dormant norms "without breach of the nullum crimen principle."¹²³

The majority opinion provides an incomplete and often misleading account of the historical development of the relevant international law. Judge Cabranes claims, for instance, that corporate criminal liability has only recently obtained acceptance among European legal theorists when in fact such a consensus was already visible in 1932.¹²⁴ That year, Emil Rappaport observed that "[t]he conflict concerning the nature of the liability of corporations, which seemed at first sight so difficult to settle, has disappeared in these last years."¹²⁵ That would explain why lawyers at Nuremberg

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¹²¹ Ratner, supra note 70, at 11.
¹²² Nerlich, supra note 82, 899.
¹²³ Id.
¹²⁵ Emil S. Rappaport, The Problem of the Inter-state Criminal Law, 18 Transactions of the Grotius Society 41, 54 (1932). Rappaport went on to explain that the emerging formula "satisfied the representatives of different scientific tendencies and has definitively solved the question of the theoretical foundation of the new international criminal code." Id. For examples of the emerging consensus see the contributions of Niko Gunsburg, Raymond Mommaert, José Agustin Martinez, Jean André Roux, Silvio Longhi, Salvatore Cicala, Mieczyslaw Ettinger, Jean Radulesco, and Thomas Givanovitch at the 1929 congress of the International Association of Penal Law that were published in 6 Revue Internationale de Droit Pénal 219–310 (1929). See also Megalos Caloyani, La Responsabilité pénale des personnes morales, in Deuxième Congrès International de Droit Pénal, Bucarest (6–12 Octobre 1929) 73–104 (1930).
universally accepted the principle that corporations were liable for violations of customary international law. The leading authority on corporations at Nuremberg has never encountered a document suggesting otherwise.\footnote{Conversation with Professor Jonathan Bush, Columbia Law School (Sept. 20, 2010).} Indeed, there is compelling evidence that legal authorities at the time made no distinction between corporate and individual liability.\footnote{Bush, \textit{supra} note 65, at 1150–51, 1247.} The same holds true today.\footnote{Robert McCorquodale, \textit{supra} note 118, at 300. Even Professor Carlos Vázquez concedes that "the scope of corporate responsibility under international law is probably no different from that of other non-state actors who are engaged in similar activity." Carlos M. Vázquez, \textit{Direct vs. Indirect Obligations of Corporations Under International Law}, 43 \textit{COLUM. J. TRANSNAT'L L.} 927, 930 n.10 (2005).} Elsewhere Judge Cabranes notes that "[i]nternational law is not silent on the question of the \textit{subjects} of international law . . . [n]or does international law leave to individual States the responsibility of defining those subjects."\footnote{Kiobel, 2010 WL 3611392, at *7–8.} This statement is correct. The assumption, however, that only subjects bear obligations under customary international law, is false.\footnote{CLAPHAM, \textit{supra} note 79, at 80 ("Conflating the question of subjectivity with the concepts of international legal personality and international capacity has prevented a clear appreciation of the fact that non-state actors can bear international rights and obligations (even where they have no state-like characteristics or pretensions.).") \textit{See also supra} note 79.} Judge Cabranes is looking for something that cannot be found because international law makes no distinction between the obligations of natural and juridical persons.

To support his point of view, Judge Cabranes offers well-known quotes stripped of their context. "From the beginning," Judge Cabranes asserts, "the principle of individual liability for violations of international law has been limited to natural persons."\footnote{Id. (quoting The Nuremberg Trial 1946, 6 F.R.D. 69, 110 (1946)).} He offers no support for this argument except for a few well-known quotes by Justice Jackson: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."\footnote{Kiobel, 2010 WL 3611392, at *2.} Justice Jackson, of course, was referring only to states. According to Professor Jonathan Bush, the remark "was plainly said with the aim of ensuring
that natural persons could not hide behind artificial entities like the state." The remark did not exclude corporate liability. Justice Jackson’s next sentence makes this clear: “[w]hile it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity." The second Justice Jackson quote draws no distinction between natural and juridical persons: “for the commission of such crimes individuals are responsible.” Judge Cabranes nevertheless insists that “no tribunal at Nuremberg had the jurisdiction to charge—let alone impose judgment on—a corporation.” Lawyers at Nuremberg thought differently: “[i]t is clear that the draftsmen did not intend to exclude criminal corporations from its scope.”

Throughout the majority opinion, Judge Cabranes repeatedly claims that “every international tribunal to confront the question of whether the liability of non-state actors for violations of customary international law should extend to both natural and juridical persons has considered and rejected corporate liability.” He cites no cases to support this assertion because no international tribunal has confronted this ‘question.’ It is entirely of Cabranes’s own making. His analysis of the I.G. Farben case is illustrative.

Judge Cabranes asserts that “[t]he refusal of the military tribunal at Nuremberg to impose liability on I.G. Farben is

133. Bush, supra note 65, at 1162.
134. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 150 (1947).
138. Kiobel, 2010 WL 3611392, at *3, n.22. “International tribunals have continually declined to hold corporations liable for violations of customary international law.” Id. at *15. “Looking to international law, we find a jurisprudence, first set forth at Nuremberg and repeated by every international tribunal of which we are aware, that offenses against the law of nations (i.e., customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations.” Id. at *3.
not a matter of happenstance or oversight." The military tribunal refused no such thing. The discretion to charge corporations was left to the prosecutors, who ultimately decided against prosecuting I.G. Farben for reasons of expedience. The complicated governance structure of I.G. Farben made it impractical to charge the corporation. Judge Cabranes's analysis goes against the weight of historical evidence and turns entirely on a selective quotation from the I.G. Farben decision:

the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.

Judge Cabranes concludes that:

in declining to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, while prosecuting the men who led I.G. Farben, the military tribunals . . . expressly defined liability under the law of nations as liability that could not be divorced from individual moral responsibility.

The passage from the I.G. Farben case, however, does not refer to corporate liability. Rather, it refers to the use of conspiracy liability, as the next sentence shows. Directly after the point where Cabranes stops quoting, Judge Morris continues:

Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand [the management board].

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139. Id. at *14 (emphasis added).
140. Bush, supra note 65, at 1094–95.
141. Id. at 1170.
142. 8 T.W.C., supra note 71, at 1153.
Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime.\textsuperscript{144}

In short, the tribunal was not speaking about corporate liability and merely expressed its unease with the application of conspiracy liability to individual responsibility.\textsuperscript{145}

Judge Cabranes’s use of historical evidence is equally questionable in his analysis of more recent tribunals. For instance, he claims that the Rome Statute represents the “express rejection . . . of a norm of corporate liability in the context of human rights violations” because its drafters did not extend jurisdiction over corporations.\textsuperscript{146} This use of the \textit{travaux préparatoires} is problematic for several reasons. The Rome Statute expressly rejects the notion that it reflects or sets out customary international law.\textsuperscript{147} The statute clearly states that “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”\textsuperscript{148} The statute serves a more limited purpose: determining the appropriate bailiwick for the new international criminal court. Thus, the failure to provide international remedies for certain well-established norms of customary international law reflects political decisions about which crimes the court is best suited to prosecute. Crimes not included in the statute have not fallen out of customary international law. Likewise, the decisions to limit the

\begin{thebibliography}{148}
\bibitem{144} 8 T.W.C., \textit{supra} note 71 at 1153.
\bibitem{148} \textit{Id.}
\end{thebibliography}
jurisdiction of the ad hoc tribunals reflected certain political decisions about expediency. To impute vast legal meaning to the drafters’ omissions would be a mistake. That is particularly true considering that at the Rome Statute negotiations, for example, “no delegation challenged the conceptual assumption that legal persons are bound by international criminal law.”

The majority opinion relies on distinctions that have no basis in international law, and misstates international jurisprudence. Finally, Judge Cabranes claims that even if there are no sources “of international law addressing corporate liability, that supposed lack of authority would actually support [the] holding.” No, it would not.

Judge Cabranes’s attempt to assimilate the rules of domestic enforcement into the international conduct-regulating norm analysis is illogical and defies the precedent of the Second Circuit and the Supreme Court. His analysis is based entirely on a misrepresentation of Khulumani and Presbyterian Church, and a questionable analogy between corporate liability and conduct-regulating norms of liability, like aiding and abetting. A more complete analysis of the choice of law dilemma under the ATS can be found in Part IV of this Article. For now, suffice it to say that courts must look to international law to determine the relevant substantive law.

The question then turns on whether the liability is substantive or ancillary, in which case federal common law may be applied. The analogy between corporate liability and conduct-regulating norms of liability will only hold if there is a substantive norm of international law. Some areas of international law have not been sufficiently theorized to distinguish between permissive and prohibitive norms—but domestic enforcement is not one of them. Domestic enforcement is not one of them.

149. Clapham, supra note 66, at 191.
150. See supra notes 114–130 and accompanying text.
151. See supra notes 138–149 and accompanying text.
152. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *3 (2d Cir. Sept. 17, 2010). Until Kiobel, this type of overreaching was limited to appellate briefs. See infra notes 347–366.
153. See infra Part IV.
154. See infra note 222.
155. Casto, supra note 3, at 695.
enforcement is governed by permissive norms of international law. Conduct-prohibiting norms, on the other hand, are obligatory. Sosa's clear definition requirement applies only to these obligatory conduct-regulating norms. In a nutshell, "Sosa held that in ATS litigation the norm regulating conduct must be found by the federal courts in international law. Other rules of decision that are not conduct-regulating norms are to be legislated by the courts as ordinary federal common law." Professor Casto's conduct-regulating approach to the Alien Tort Statute neatly dovetails with the logic of international law. Judge Cabranes would have courts look to international mechanisms for all of the rules, even when international law cannot provide an answer.

Judge Cabranes begins by arguing that since Sosa, the Second Circuit has looked to "customary international law to determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued." He then leapfrogs to Chief Judge Jacobs' decision in Presbyterian Church. He quotes from Presbyterian Church unimpeachable statements such as "footnote 20 of Sosa, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law" and "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." He then adds his own personal gloss, arguing that in Presbyterian Church the court "looked to international law to determine not only what conduct is cognizable under the ATS, but also the

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at 37 ("If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort.").

157. Casto, supra note 3, at 695.


160. Id. at *9–10 (citing Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 258–59 (2d Cir. 2009)).
identity of the persons to whom that conduct is attributable (in that case, aiders and abettors)."\textsuperscript{161} \textit{Presbyterian Church} does not support this general principle because it adopted "as the law of [the Second] Circuit" Judge Katzmann's more limited rule in \textit{Khulumani}.\textsuperscript{162}

Judge Cabranes claims that "[i]n \textit{Khulumani}, Judge Katzmann observed that aiding and abetting liability—much like corporate liability—does not constitute a discrete criminal offense but only serves as a more particularized way of identifying the persons involved’ in the underlying offense."\textsuperscript{163} But Judge Katzmann said no such thing. Nowhere in his opinion does he draw an analogy with corporate liability. Nor does he ever claim international law governs domestic enforcement. Instead, he merely draws an analogy between the substantive law of international tribunals and domestic courts.\textsuperscript{164} Judge Katzmann articulates a general principle only when noting "that we most effectively maintain the appropriate scope of [ATS] jurisdiction by requiring that the specific conduct allegedly committed by the defendants sued represents a violation of international law."\textsuperscript{165} Liability is conflated with jurisdiction. Judge Katzmann is simply reiterating the basic fact that courts look to international law when determining substantive law.\textsuperscript{166} \textit{Sosa}'s footnote twenty, Judge Katzmann notes, "is equally applicable to the question of where to look to determine whether the scope of liability for a violation of international law should extend to aiders and abettors."\textsuperscript{167} This approach accurately reflects \textit{Sosa}'s conclusion that international law supplies the conduct prohibiting norm while

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{161} \textit{Id.} at *9.
\item\textsuperscript{162} \textit{Talisman}, 582 F.3d at 256. \textit{"Presbyterian Church . . . expressly adopted Judge Katzmann's rule as the law of our Circuit."} \textit{Kiobel}, 2010 WL 3611392, at *22.
\item\textsuperscript{163} \textit{Kiobel}, 2010 WL 3611392, at *10.
\item\textsuperscript{164} \textit{Khulumani v. Barclay Nat'l Bank, Ltd.}, 504 F.3d 254, 280 (2d Cir. 2007).
\item\textsuperscript{165} \textit{Id.} at 269 (Katzmann, J. concurring) (emphasis added).
\item\textsuperscript{166} Judge Katzmann mentions "two distinct analytical inquiries. One is whether jurisdiction lies under the [ATS]. The other is whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law. Requiring this analytical separation in [ATS] litigation comports with the general principle that whether jurisdiction exists and whether a cause of action exists are two distinct inquiries." \textit{Id.} at 266.
\item\textsuperscript{167} \textit{Kiobel}, 2010 WL 3611392, at *10 (citing \textit{Talisman}, 582 F.3d at 256).
\end{enumerate}
\end{footnotesize}
federal common law governs ancillary rules. Although many lower courts recognize private liability under the Alien Tort Statute, the Court never established in Sosa whether "international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." It did hint, however, that corporations are liable for certain violations of international law.

In Khulumani, Judge Katzmann rejected attempts by Judge Korman to analogize between conduct-regulating norms, like aiding and abetting liability of international law, and norms of domestic enforcement like corporate liability. "We have repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be." In Kiobel, the court sets these concerns aside: “whatever Judge Katzmann’s view on the ultimate question of corporate liability under the ATS, his reasoning in Khulumani leads to the inescapable conclusion that customary international law governs the question.”

This iron cage is entirely of Judge Cabranes’s own making. He finds support for his interpretation only by distorting the decision of his colleague on the Second Circuit, and through an expansive reading of the cryptic footnote twenty in Sosa. On these grounds alone Kiobel merits en banc review.

In sum, although there may be ample evidence showing that corporations were considered liable for violations of customary international law at the Nuremberg trials, plaintiffs do not bear the burden of proving this fact. Courts applying the Alien Tort Statute look to international law only

168. Teddy Nemeroff, Note, Untying the Khulumani Knot: Corporate Aiding and Abetting Liability under the Alien Tort Claims Act after Sosa, 40 COLUM. HUM. RTS. L. REV. 231, 282 (2008) ("A close reading of Sosa suggests that Judge Korman’s approach over-interprets footnote twenty, reading into it guidance that the Court did not intend to provide.").


170. Id. (pairing corporate and individual liability together under the heading: "private actor").


172. Id. at 282.

for substantive norms.\footnote{Any other interpretation would frustrate the purpose of the ATS and render the statute a dead letter at the time when it was drafted by Congress. See Brief of Amici Curiae Professor of Federal Jurisdiction and Legal History, Balintulo v. Daimler AG, at 15, No. 09-2778-cv (2d Cir. Dec. 23, 2009).} The clear definition requirement is not applied to ancillary rules of enforcement.

The majority opinion is well summarized by Judge Leval:

Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations, and other juridical entities, are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.

\[\ldots\] So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims.\footnote{Judge Leval's repeated references to the "illogical," "strange," and "internally inconsistent" analysis of the majority is an understatement. \textit{Id.} at *4. The recent decision in \textit{Doe v. Nestle} is problematic for many of the same reasons. Order Granting Motion to Dismiss, Doe v. Nestle, S.A., No. 2:05-cv-05513 (C.D. Cal. Sept. 8, 2010).}

The \textit{Kiobel} majority opinion is a radical departure from established principles of international and domestic law. It should be overturned posthaste.\footnote{Nonetheless, this continues to be a live issue in litigation. See infra Part VI.}

III. THE JURISDICTIONAL COMPATIBILITY OF THE ATS WITH CUSTOMARY INTERNATIONAL LAW

The ATS is a form of adjudicatory jurisdiction and creates no jurisdictional conflicts with international law.\footnote{176. Judge Leval's repeated references to the "illogical," "strange," and "internally inconsistent" analysis of the majority is an understatement. \textit{Id.} at *4. The recent decision in \textit{Doe v. Nestle} is problematic for many of the same reasons. Order Granting Motion to Dismiss, Doe v. Nestle, S.A., No. 2:05-cv-05513 (C.D. Cal. Sept. 8, 2010).} Custom, practice, the theory of conditional universal jurisdiction, and the emerging consensus on local remedies for torts in violation of international law all underscore this conclusion.

A. Custom and Practice

Custom and practice provide a sound basis for the extraterritorial application of the ATS. According to the
Restatement of Foreign Relations Law, "jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy." Some scholars have challenged this position, arguing that "international law principles of prescriptive jurisdiction limit the ability of individual nations to regulate conduct of non-nationals beyond national boundaries." Under the ATS, however, courts exercise adjudicatory rather than prescriptive jurisdiction. Professor Dodge has noted that "no basis for jurisdiction to prescribe is necessary" when a court applies international law. Indeed, other scholars have found that

179. Ramsey, supra note 97, at 272. "[E]ven if the investor's conduct arguably violates international law, U.S. courts cannot prescribe a remedy unless it is within the subset of international law violations subject to universal jurisdiction." Id. at 273. There are several problems with this argument. First, ATS litigation is never based on universal jurisdiction. Defendants must have minimum contact with the United States. See infra note 196. Second, Professor Ramsey's argument relies heavily on the Court's decision in F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). The case is inapposite to ATS litigation and factually and normatively dissimilar. See Ramsey, supra note 97, at 274. In Empagran, Justice Breyer was concerned about the application of domestic antitrust laws to "foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim." Empagran, 542 U.S. at 165. Far from overturning Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), the Court sharpened its effects analysis. The way to reconcile Breyer's same-term opinions in Empagran and Sosa is to accept that certain violations of customary international law "are enquirable, and may be proceeded against, in any nation." Talbot v. Janson, 3 U.S. (3 Dall.) 133, 160 (1795). "The fact that this procedural consensus exists," Breyer noted, "suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity." Sosa, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment). Thus, even as an exercise in prescriptive jurisdiction, U.S. courts may hear claims under the ATS arising from the set of norms identified in the text accompanying note 51. The final problem is Ramsey's assumption that the ATS is an exercise in prescriptive jurisdiction. See Sosa, 542 U.S. at 725–38 (majority opinion). Significantly, no other Justices joined Breyer's opinion in Sosa. Scholars have argued that the majority endorsed a very broad application of the ATS. See, e.g., William S. Dodge, Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy, HARV. INTL L.J. ONLINE 35, 44 (2010).
180. Dodge, supra note 179, at 37. See also Restatement of Foreign Relations, supra note 178 § 401.
181. Dodge, supra note 179, at 43.
In practice the assumption of jurisdiction by a State does not seem to be subject to any requirement that the defendant or the facts of the case need have any connection with the State; and this practice seems to have met with acquiescence by other States. . . . It is hard to resist the conclusion that (apart from the well-known rules of immunity for foreign States, diplomats, international organizations, etc.) customary international law imposes no limits on the jurisdiction of municipal courts in civil trials. ¹⁸²

Even under Professor Ramsey's unconventional approach to customary international law—defined purely in terms of practice ¹⁸³—it is unclear why ATS litigation would run afoul of the laws of jurisdiction.

In practice, most states acquiesce to the assertion of universal extraterritorial civil jurisdiction by U.S. courts. ¹⁸⁴

¹⁸². Michael Akehurst, Jurisdiction in International Law, 46 Brit. Y. B. Int'l L. 145, 177 (1972) (emphasis added) (citations omitted). See also, Gerald Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, in 92 Recueil De Cours, 218 (1957 II) (“[P]ublic international law does not effect any delimitation of spheres of competence in the civil sphere, and seems to leave the matter entirely to private international law—that is to say in effect to the States themselves for determination, each in accordance with its own internal law . . . .”).

¹⁸³. Compare Ramsey, supra note 97, at 271–74 (“[C]ustomary international law arises from the actual practices of nations followed out of a sense of legal obligation. . . . isolated and episodic decisions of a few international tribunals are poor indicators of the common practice of nations.”), with Statute of the International Court of Justice art. 38(d) (works of jurists are a “subsidiary means for the determination of rules of law”) and P.E. Corbett, The Consent of States and the Sources of the Law of Nations, 6 Brit. Y.B. Int'l L. 20, 29–30 (1925) (“Among such records or evidence, [proving international law] treaties and practice play an essential part, though recourse must also be had to . . . the writings of authoritative jurists.”). Professor Ramsey's approach to CIL resembles the controversial view of Carl Lueder, Krieg und Kriegsrecht im Allgemeinen, Handbuch Des Völkerrechts 169 (1889). Suffice it to say that if customary international law were determined solely through continuing practice there never would have been a great controversy over the German legal doctrine of kriegsraison during the late nineteenth and early twentieth century. See Elihu Root, Presidential Address at the Fifteenth Annual Meeting of the American Society of International Law, April 27, 1921, 7 Int'l Conciliation 259, 263 (1921) (“Either the doctrine of kriegsraison must be abandoned definitely and finally, or there is an end of international law . . . .”). The norm against the kriegsraison justification, like many other principles of international law, was derived from the work jurists. Professor Ramsey also fails to consider the extent to which the norms applied by international tribunals are entrenched in international law.

According to Professor Antonio Cassese, this "implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, where there are serious and blatant breaches of universal values, national courts are authorized to take action subject to fulfillment of some fundamental requirements, such as ensuring a fair trial."\textsuperscript{185} Canadian courts saw nothing wrong with litigation against the mining conglomerate Talisman Energy.\textsuperscript{186} The European Commission has also expressed cautious support for ATS litigation so long as courts "rigorously apply international law," and exercise universal civil jurisdiction "only when the claimant would face a denial of justice in any State that could exercise jurisdiction on a traditional basis, such as territory or nationality."\textsuperscript{187} Indeed, most European states "appear to countenance the principle of universal tort jurisdiction under international law, and to limit themselves to reminding the United States to remain reasonable in their

\textsuperscript{185} Id.
\textsuperscript{186} Presbyterian Church of Sudan v. Rybiak (2006) 215 O.A.C. 140, 33 C.P.C. (6th) 27, 275 D.L.R. (4th) 512 (Ont. C.A.), \textit{available at http://www.ontariocourts.on.ca/decisions/search/en/OntarioCourtsSearch_VOpe nFile.cfm?serverFilePath=D%3A\Users\Ontario%20Courts\www\decisions\2 006\september\C44057.htm} (agreeing with the lower court that "the foreign request does not contravene the public policy of Canada. The diplomatic note cannot be read as a statement of public policy requiring its dismissal."). Canada's government, however, filed a brief urging the Second Circuit to dismiss the case. \textit{See Brief of Amicus Curiae The Government of Canada in Support of Dismissal of the Underlying Action, Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244 (2d. Cir. 2009) (No. 07-cv-0016). Canada's argument was based on the assumption that the ATS is an exercise in extraterritorial prescriptive jurisdiction. Id. at 10.}
\textsuperscript{187} Id. at 10.
\textsuperscript{186} Brief of Amicus Curiae the European Commission in Support of Neither Party at 4–5, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) (Jan. 23, 2004), 2004 WL 177036. \textit{Compare Brief of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner at 6, Sosa, 542 U.S. 692 (No. 03-339) (arguing that international law does not "recognize universal civil jurisdiction for any category of cases at all, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law"), with infra notes 196–211. More troubling are claims by the United Kingdom that Apartheid litigation "infringes the sovereign rights of States to regulate their citizens and matters within their territory." Brief for the United States as Amicus Curiae in Support of Petitioners at 20, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919). This conclusion is premised on the faulty assumption that the "conduct is not alleged to have been at variance with the domestic laws of South Africa or any other of the countries concerned." Id. Under the ATS, courts apply customary international law.
jurisdictional assertions."\textsuperscript{188} Other states are following suit. The government of South Africa, which opposed litigation for apartheid era claims until very recently, has changed its policy.\textsuperscript{189} In a letter to the Southern District of New York, South African Minister of Justice Thamsanqa Radebe declared that the "Government of the Republic of South Africa, having considered carefully the judgment of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law."\textsuperscript{190} Even corporate defendants have begun to accept the statute as a permanent feature of the legal landscape. Just last year, two major corporations agreed to settle significant ATS claims.\textsuperscript{191}

There are, however, exceptions to the general trend of

\textsuperscript{188} CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 126 (2008).

\textsuperscript{189} Letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, to Judge Shira Scheindlin, United States District Court for the Southern District of New York (Sept. 1, 2009), available at http://www.khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindlin_09.01.09.PDF. The change in South African policy has led to a significant turn in that of the United States. \textit{Compare} Brief for the United States as Amicus Curiae Supporting Appellees at 11, Balintulo v. Daimler AG, No. 09-2778-cv (2d Cir. Nov. 30, 2009) ("The requirement of an explicit request for dismissal on foreign policy grounds by the Executive Branch is, in our view, critical. Although the Executive Branch informed the courts that these suits could harm the United States' foreign relations, at no time in this litigation did the United States seek dismissal on that basis."), \textit{with} Brief of the United States of America Amicus Curiae Supporting Defendant-Appellees, at 5, Khulumani v. Barclay National Bank, Ltd., 504 F.3d 254 (2d Cir. 2007), available at http://www.state.gov/documents/organization/87317.pdf ("It would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances to regulate [the] conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa."). This is the most significant evidence yet of a change in policy under the Obama administration. It effectively undermines all Bush-era statements of interest that did not "explicitly" seek dismissal.

\textsuperscript{190} See Letter from Radebe, \textit{supra} note 189.

non-contestation. Recently, in *Jones v. Saudi Arabia*, Lord Hoffman noted in dicta that ATS cases are “contrary to customary international law.” Lord Hoffman’s opinion offers no support for this conclusion and generally betrays a fundamental misunderstanding of the Alien Tort Statute. This statute does not, for example, allow courts to circumvent the Foreign Sovereign Immunities Act. In *Argentine Republic v. Amerada Hess Shipping Corp.*, which Lord Hoffman did not cite, the Court held that “the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts.” Scholars have also pointed out that Hoffman’s sharp distinction between civil and criminal proceedings has “no basis in international law.” A close reading of *Jones* does not inspire confidence. It should not influence our understanding of the ATS. Nor should it foreclose corporate liability.

Finally, in evaluating this evidence of customary international practice, scholars should recall Professor Akehurst’s axiom that: “[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests.” No diplomatic protests have ever been lodged in response to ATS litigation.

**B. Conditional Universal Jurisdiction**

The principle of conditional universal jurisdiction is applicable to most alien tort claims and is a well-established part of customary international law. Even in *S.S. Lotus*,

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194. For a careful demolition of *Jones*, see Brief of Professors of Public International and Comparative Law at 29–34, 31 n.14, Samantar v. Yousuf, 130 S. Ct. 2278 (No. 08-1555). According to Professor William Dodge, even if *Jones* were an accurate statement of international law, it would “not necessarily be applied as common law” because “sovereign immunity has long been treated as a question of comity in the United States rather than as a question of customary international law.” William S. Dodge, *Samantar Insta-Symposium: What Samantar Doesn’t Decide*, OPINIO JURIS (Jun. 2, 2010, 8:42 PM), http://opiniojuris.org/2010/06/02/samantar-instasymposium-what-samantar-doesnt-decide/.


considered by many the “high water mark of laissez-faire in international relations,” the Permanent Court of Justice recognized that “[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory,” international law leaves states “a wide measure of discretion, which is only limited in certain cases by prohibitive rules.” The Court reiterated that, “[i]n these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction.”

Although some scholars have criticized this interpretation of Lotus, the International Court of Justice has endorsed it.

Universal jurisdiction is invoked where “there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.” LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVE 5 (2003). In contrast, conditional universal jurisdiction is based on contact with the forum. In ATS litigation there are always “minimum contacts.” See RESTATEMENT OF FOREIGN RELATIONS supra note 178, § 421; infra note 391 (on the structural safeguards of conditional universal jurisdiction). Simply put, criticisms of universal jurisdictions are inapplicable to ATS litigation. For example, Judge Guillaume’s famous separate opinion criticizing universal jurisdiction was limited to the exercise of this jurisdiction in absentia. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 378 at 9, 12 (Feb. 14).

197. Arrest Warrant, supra note 196, ¶ 51 (joint sep. op. Higgins, J., Kooijmans, J., and Buergenthal, J.)

198. S.S. “Lotus” (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18–19 (Sept. 7). See also REYDAMS, supra note 196, at 15 (arguing that international law governs the area of extraterritorial jurisdiction over foreigners and recognizes multiple concurrent jurisdiction).


200. Compare Vaughan Lowe, Jurisdiction, in INTERNATIONAL LAW, supra note 87, at 329, 335 (“It is extremely improbable that this is what the Court meant to say.”), with Declaration of President Bedjaoui, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 at 290–91 (arguing that the “positivist, voluntarist approach of international law [found in Lotus] . . . has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.”), and Arrest Warrant, supra note 196, ¶ 51 (joint sep. op. Higgins, J., Kooijmans, J., and Buergenthal, J.) (“The international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is ‘made over’ to international treaties and tribunals, with national courts having no competence in such matters.”). Even the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal acknowledges that there is “nothing in this case law which
Critics contend that neither civil nor aiding and abetting liability warrants the application of conditional universal jurisdiction.\(^{201}\) They are mistaken. First, there is no great difference between asserting civil and criminal jurisdiction over aliens.\(^{202}\) As Professor Luc Reydams has noted, “if universal criminal jurisdiction is permissible under international law, universal civil jurisdiction is also permissible.”\(^{203}\) Indeed, in \textit{Ferrini v. Repubblica Federal di Germania} the Italian Court of Cassation held that “there is no doubt that the principle of universal jurisdiction also applies to civil actions.”\(^{204}\) Second, international law dictates that aiding and abetting liability is every bit as serious as direct liability. In \textit{Prosecutor v. Tadić}, the Trial Chamber of the International Tribunal for the Former Yugoslavia noted:

> [a]lthough only some members of the group may physically perpetrate the criminal act . . . the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less—or indeed no different—from evidences an \textit{opinio juris} on the illegality of such a jurisdiction. . . . There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful.” \textit{Id.} ¶¶ 45–6.

For clarity’s sake, it is necessary to underscore that this is not the infamous \textit{Lotus} principle. Instead, I have shown how a jurisdictional presumption from that decision weathered the laissez-faire era of international law and found new purpose in our own time. The actual \textit{Lotus} principle—the notion that “[r]estrictions on the independence of States cannot . . . be presumed”—finds no support in international law and remains highly controversial. \textit{See, e.g.}, \textit{Nuclear Weapons}, 1996 ICJ Rep. at 266. It also lies squarely at odds with the fundamental principle of the Martens Clause.


203. REYDAMS, \textit{supra} note 196, at 3.

that of those actually carrying out the acts in question.\textsuperscript{205} Professor Gerhard Werle has shown that this is a well-established principle of international law. "It must be kept in mind," he warns, "that the degree of criminal responsibility does not diminish as distance from the actual act increases."\textsuperscript{206} Further undermining critics of ATS litigation is the evolution of international law toward a common set of standards for international civil liability.\textsuperscript{207}

\textbf{C. An Emerging Consensus}

The emerging consensus toward local remedies for torts in violation of international law indicates that federal courts will not run afoul of international law or the \textit{Charming Betsy} doctrine,\textsuperscript{208} so long as the standards of substantive federal common law are those established in customary international law.\textsuperscript{209} As Judge Scheindlin has noted, the ATS applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives. Therefore, unlike the application of specific rules formulated by American legislators or jurists, the adjudication of tort claims stemming from acts committed abroad will not generate conflicting legal obligations, and there is a substantially reduced likelihood that adjudication will legitimately offend the sovereignty of

\textsuperscript{205} \textit{Prosecutor v. Tadić}, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 191 (July 15, 1999).


\textsuperscript{208} Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

foreign nations.\textsuperscript{210}

This comports with the finding of the International Tribunal for the Former Yugoslavia in \textit{Prosecutor v. Furundžija} that "the victim could bring a civil suit for damage in a foreign court."\textsuperscript{211} Domestic courts may apply domestic remedies and local ancillary rules of decision, but must seek out international standards.\textsuperscript{212} As Professor William Casto recognizes, if "international law clearly obligates the United States to apply a particular rule of decision in private litigation, the courts—absent unusual circumstances [namely an act of Congress\textsuperscript{213}]—should apply the obligatory rule."\textsuperscript{214} Fortunately, the international standard for direct violation of international law is undisputed.\textsuperscript{215} Deducing the standards for aiding and abetting is a good deal more complicated.

**IV. THE CHOICE OF LAWS DILEMMA FOR THE SOURCE OF SUBSTANTIVE LAW UNDER THE ATS**

The courts apply two different—yet nearly identical\textsuperscript{216}—standards of aiding and abetting liability. The more

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\item \textsuperscript{210} \textit{In re S. African Apartheid Litig.}, 617 F. Supp. 2d 228, 247 (S.D.N.Y. 2009). \textit{See also Casto, supra} note 3, at 643 ("When a court elaborates upon the existence and scope of the norm that is being enforced, the court is not engaging in judicial lawmaking. Rather, the court is simply discovering or expounding norms that already exist in international law.").

\item \textsuperscript{211} \textit{Prosecutor v. Furundžija}, Case No. IT-95-17/1-T Trial, Judgment, ¶ 155 (Dec. 10, 1998).

\item \textsuperscript{212} \textit{Presbyterian Church of Sudan v. Talisman Energy, Inc.}, 244 F. Supp. 2d 289, 321 (S.D.N.Y. 2003) ("[C]ourts must look to international law to determine the relevant substantive law.").

\item \textsuperscript{213} \textit{See} The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will be passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.").

\item \textsuperscript{214} Casto, \textit{supra} note 3, at 643. \textit{See also Dodge, supra} note 179, at 37 ("Courts do not apply U.S. substantive law in ATS cases; they apply customary international law."); \textit{Restatement of Foreign Relations, supra} note 178, § 421 (federal court should consider international jurisdictional principles); \textit{see infra} notes 238–43.

\item \textsuperscript{215} \textit{Dunoff et al., supra} note 76, at 204–07.

\item \textsuperscript{216} The standard found in \textit{Restatement (Second) of Torts} § 876(b) (1979) that an individual is liable for aiding and abetting "if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other" is exactly the same as the international standard found in customary international law.
traditional standard is based on domestic federal common law. The other standard originated at Nuremberg and has been applied by international ad hoc tribunals. The choice of law problem first arose in *Doe v. Unocal*, and judges have grappled over which standard to apply ever since.\(^{217}\) The Second Circuit decision in *Khulumani*,\(^{218}\) which netted three different interpretations, is a prime example. Failing to reach a consensus, the court decided to leave the task of determining “whether international or domestic federal common law is the exclusive source from which to derive the applicable standard” to a future panel of the court.\(^{219}\) Any future Supreme Court decision on the ATS should address this problem.

This choice of laws problem seems illusory, yet the problem returns to plague federal courts, cropping up even in the best-reasoned opinions. For instance, in the most recent decision in the *South African Apartheid Litigation* line of cases, Judge Scheindlin acknowledged that “[a]lthough cases in this Circuit have only required consultation of the law of nations concerning the existence of substantive offenses, the language and logic of *Sosa* require that this Court turn to customary international law to ascertain the contours of secondary liability as well.”\(^{220}\) This is true enough. Only a few pages later, however, after having explained that “vicarious liability is clearly established under customary international law, obviating any concerns regarding universality,” Judge Scheindlin held that because “the international law of agency has not developed precise standards for this Court to apply in the civil context” it makes more sense to apply “federal common law principles concerning agency.”\(^{221}\)

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217. *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002). An out of court settlement in that case foreclosed an en banc review of the question.
218. 504 F.3d 254 (2d Cir. 2007).
219. *Id.* at 286 n.38 (Hall, J. concurring).
220. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 255–56 (S.D.N.Y. 2009) (adding “as the [ATS] is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary liability must stem from international sources.”). *Id.* at 256. *But see Khulumani*, 504 F.3d at 284 (Hall, J., concurring) (“As *Sosa* makes clear, a federal court must turn to international law to divine standards of primary liability under the[ATS]. To derive a standard of accessorital liability, however, a federal court should consult the federal common law.”).
221. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 271.
The choice of law problem facing ATS litigation is illusory because the rules of decision are straightforward: "courts must look to international law to determine the relevant substantive law." Federal common law may then be applied interstitially to resolve ancillary issues. The choice-of-law debate turns on whether the aiding and abetting conduct regulated by law is substantive or ancillary. Professor Casto has persuasively argued that "Sosa held that in ATS litigation the norm regulating conduct must be found by the federal courts in international law. Other rules of decision that are not conduct-regulating norms are to be legislated by the courts as ordinary federal common law." This age-old principle can even be found in the writings of James Wilson: "[e]ach nation owes to every other the duties of humanity. It is true, there may be some difference in the application, in this as well as in other instances: but the principles of the application are the same." As with corporate liability, the root of the problem is not a lack of clear standards in international law. Rather, lacking a clear roadmap the courts take the familiar path of least resistance. As Judge Hall admitted in Khulumani: "lacking the benefit of clear guidance, I presume a federal court should resort to its traditional source, the federal common law, when deriving the standard."

A. The Limits of the Federal Common Law Approach

Courts have a wealth of history, tradition, and precedent at their disposal to apply in adjudicating federal aiding and abetting claims. Aiding and abetting liability has long been part of our common law and predates the ATS. Blackstone’s Commentaries warn that “breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the laws of nations) declared to be high treason.” “Cases from that era,” the Second Circuit noted in Khulumani, “indicate that secondary liability was recognized as an established part of the federal common

223. Casto, supra note 3, at 695.
225. Khulumani, 504 F.3d at 286.
Drawing on the law of nations, Judge Wilson charged the grand jury in *Henfield's Case* that those "who commit, aid, or abet hostilities against these powers . . . offend against the laws of the United States, and ought to be punished." The earliest reference to this theory of liability in conjunction with the Alien Tort Statute arises from the Republic's early attempts to maintain strict neutrality. In 1795, Attorney General William Bradford warned Americans they could be liable under the Alien Tort Statute if they "voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast." Citing an earlier declaration by President Washington, he reiterated his warning to "those who should render themselves liable to punishment under the laws of nations, by committing, aiding, or abetting hostilities against any of the said parties." That same year, in *Talbot v. Jansen*, the Court held a Frenchman liable under the law of nations for aiding and abetting an American's unlawful capture of a neutral vessel in wartime. Justice Paterson held that Talbot, the Frenchman, was not "warranted in seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers." Despite knowing that the American "had no commission," Talbot armed the ship with guns and performed an "essential part of the outfit." Even at this early date, the two prongs of

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228. *Henfield's Case*, 11 F. Cas. 1099, 1099 (C.C.D. Pa. 1793) (No. 6360). *See also* *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 53 (E.D.N.Y. 2005) ("The liability of private actors, as aiders and abettors, for violations of international law was understood at the time the ATS was enacted.").

229. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 58 (1795) (adding "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations"). *Id.* at 59.

230. *Id.*

231. 3 U.S. (3 Dall.) 133 (1795).

232. *Id.* at 156.

233. *Id.*
Aiding and abetting analysis—knowledge and substantial assistance—were apparent. Aiding and abetting liability was formally codified as § 876 of the Restatement (Second) of Torts and the leading case on the subject today is Halberstam v. Welch. 234

Advocates of the federal common law approach, like Judge Reinhardt of the Ninth Circuit, argue that third-party liability "is a straightforward legal matter that federal courts routinely resolve using common law principles." 235 These principles, he argues, "provide the traditional and time-tested method of filling in the interstices and resolving the type of ancillary legal questions presented by this case." 236 Many scholars and students agree. 237 Yet none of these accounts successfully explain why third-party liability is an ancillary legal question. Aiding and abetting liability also constitutes substantive customary international law. Like Judge Reinhardt, the most articulate champions of the federal common law approach know full well that courts must apply international law when it plays a substantive role. 238 Domestic law may supply the rules so long as they match international standards, but given that there is no evidence

234. 705 F.2d 472, 477–78 (D.C. Cir. 1983). Courts follow Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (recognizing that "international disputes implicating ... our relations with foreign nations" are one of the "narrow areas" in which federal common law continues to exist).

235. Doe v. Unocal Corp., 395 F.3d 922, 966 (9th Cir. 2002).

236. Id.


238. See Vora, supra note 237, at 196. Even Judge Reinhardt acknowledges, "international law applies to the substantive violation." Unocal, 395 F.3d at 966. Vora cites to the proposition that “international law in turn says that such liability rules can be supplied by domestic law.” Vora, supra note 237, at 217 n.107 (citing Comment, 121 HARV. L. REV. 1953, 1960 (2008)). This approach ignores that courts must apply international law where it provides a clear standard for the norm regulating conduct. See supra notes 212–14 and infra notes 239–43 and accompanying text. Thus, Vora’s plea for federal common law rules of decision ultimately collapses into a circular argument.
that they will continue to do so, courts should consistently apply international law. To comport with international law and rules of adjudicatory jurisdiction, the ATS must be governed by international standards whenever they are available.

Much of the aversion to international law standards is grounded in a misunderstanding of international law. For example, in praising the “the vast experience embodied in federal common law” Judge Reinhardt errs in comparing it to what he calls “an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal.”239 The next Section will show that the knowledge standard, far from being a “nascent criminal law doctrine recently adopted by an ad hoc criminal tribunal,”240 has been a feature of international law for decades. Judge Reinhardt’s preference for federal common law as the better-defined body of precedent is mistaken. It also runs afool of the jurisdictional constraints on the application of domestic substantive law to foreign corporations. As the Southern District of Indiana recently noted, the ATS “does not provide an invitation to apply substantive domestic United States law to activity throughout the world.”241 Under international law “U.S. Courts are not permitted to create common law liability for non-U.S. conduct of foreign defendants merely on the basis of U.S. domestic regulatory standards.”242 The operating word here is merely. Had Judges Reinhardt and Hall accounted for international standards nothing would have precluded federal common law application of local remedies. The Court should have looked at international law first:

[w]here federal law does not provide a clear rule, the courts borrow from analogous federal or even state rules, as appropriate, to answer ancillary issues. Here, a court might ask first whether international law provides a clear answer, then look to federal vicarious liability standards

239. Unocal, 395 F.3d at 967.
240. But see Restatement of Foreign Relations, supra note 178, § 103(2)(a) & cmt. b. ("To the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is.").
The municipal law that enforces international law must be consistent with international law. Ideally courts would “apply the uniform rules of federal common law derived from international and federal law.” This federal common law, however, “should not be construed based on the whims of judges, but rather should be based on established federal and international legal precedent. This method furthers the federal and international values of uniformity, predictability, and consistency.”

B. The Virtues of the International Law Approach

Identifying which body of international law governs aiding and abetting liability is a secondary problem in the choice-of-laws debate. The standards set out at Nuremberg are manageable and represent the current status of international law. Even critics of ATS litigation acknowledge that “the concept of criminal aiding and abetting liability is well established” in international law. After reviewing “international law’s treatment of aiding and abetting liability over the past sixty years” Judge Katzmann concluded “that aiding and abetting liability . . . is sufficiently ‘well-established [and] universally recognized’ to be considered customary international law for the purposes of the [ATS].”

243. Stephens, supra note 46, at 560 (emphasis added).
245. Id. at 49.
246. Brief of the United States of America as Amicus Curiae Supporting Defendant-Appellees at 21, Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-cv, 05-2326-cv). This concession by the Bush Administration was tempered by its simultaneous attempt to rehabilitate the discredited thesis that unless international law provides a “specific private right to redress” there is no equivalent cause of action under ATS. This argument was resoundingly rejected in Sosa. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). The non-existence of an international law of torts does not imply the non-existence of domestic remedies. This argument was reprised in In Re S. Africa Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (arguing that ATS “does not provide for aider and abettor liability, and this Court will not write it into the statute. In refusing to do so, this Court finds this approach to be heedful of the admonition in Sosa that Congress should be deferred to with respect to innovative interpretations of that statute”) which was reversed and remanded. Judge Scheidlin has since correctly rejected this line of argument.
He also recognized the “individual responsibility of a defendant who aids and abets a violation of international law is one of those rules ‘that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern,’” but nevertheless went on to cite the Rome Statute as though it reflects customary international law. The Court must review and correct this common misapplication of the law.

The standard for aiding and abetting emerged at Nuremberg, not in the jurisprudence of a nascent ad hoc tribunal, as Judge Reinhardt has claimed. Control Council Law No. 10 states that a person

is deemed to have committed a crime . . . if he was (a) a principle or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.

The Nuremburg standard for mens rea required “knowledge that these acts assist the commission of the offence.” In the Flick trial, the tribunal held that “[o]ne who knowingly by his influence and money contributes to support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.” This standard was applied in numerous cases against corporate officers. It has not been supplanted by the purposefulness standard set out in Article 25(3)(c) of the Rome Statute.

The Rome Statute itself rejects such reliance in Article 10 and does not pretend to be customary international law.

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248. Id. at 270.
249. *See supra* text accompanying note 235.
252. 6 T.W.C., *supra* note 71, 1217.
253. In addition to the Nuremberg cases I have cited so far see *In re Tesch & Others* (Zyklon B Case) (British Mil. Ct. 1946), in 1 U.N. WAR CRIMES COMMN, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 101 (1947) (holding that the two industrialists “knew that the gas was to be used for the purpose of killing human beings”).
255. *See supra* note 92; *see also* Brief of David J. Scheffer, at 3, *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d. Cir. 2009) (No. 07-
Indeed, as Professor Robert Cryer has pointed out, Article 25(3)(c) neither reflects nor sets out customary international law: the article “introduces a purposive, motive requirement that is not required by custom (under which knowledge suffices). Thus the crime is not defined in accordance with customary international law, but in practice the addition of the purposive intent will render liability under the Rome Statute more narrowly than in custom.” The Rome Statute does not supplant existing norms of customary international law and must be construed to conform to established norms. According to Judge Scheindlin, there is “no explicit deviation in the Rome Statute with regard to aiding and abetting liability. Article 25(c) can be reasonably interpreted to conform to pre-Rome Statute customary international law.”

Despite the wealth of case law from the Nuremberg era, Judge Katzmann focused entirely on one rather exceptional aspect of the Ministries case to establish a purposive requirement. Here the tribunal refused to impose criminal liability on a bank officer who “made loans and payments to and collected money from the SS knowing that the purpose was to purchase ‘aryanized’ property extorted all over Europe” reasoning against much evidence to the contrary that “banks and bankers are mere cut-outs, ciphers who bundle money from investors and pass it along to borrowers and are not responsible for what the borrower does with the money.” The tribunal rejected “the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrower.” Mens rea, however, was not pivotal in Rashe’s exoneration. As Judge

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256. Robert Cryer, The Boundaries of Liability in International Criminal Law, or ‘Selectivity by Stealth’, 6 J. CONFLICT & SECURITY L. 3 (2001). See also WERLE, supra note 206, at 127 (arguing that “[k]nowledge of the primary perpetrator’s intent is sufficient”).
258. Khulumani v. Barclay Nat.1 Bank Ltd., 504 F.3d 254, 276 (2d Cir. 2007).
261. But see Khulumani, 504 F.3d at 254 (erroneously reading a purpose requirement).
Scheindlin insightfully noted,

the acquittal did not rest on the absence of criminal intent. The Tribunal never discussed whether facilitation of a loan with express intent to further the crimes of the S.S. would create criminal liability, indicating that the \textit{mens rea} was not pivotal. Rather, the Tribunal focused on the nature of the act, stating, “[W]e are not prepared to state that such loans constitute a violation of that law.” In other words, the Tribunal acquitted Rasche for not having met the \textit{actus reus} requirement of aiding and abetting. Moreover, with regard to different defendants in the same case, the Tribunal stated, “The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it.” Thus the \textit{Ministries} case does not deviate from the standard \textit{mens rea} requirement found in customary international law.\textsuperscript{262}

This well-reasoned piece of judicial craftsmanship is the proper approach to the \textit{Ministries} case. This interpretation of \textit{Ministries} succeeds in reconciling the case of Rasche with that of Emil Puhl, a deputy to the President of the German Reichsbank, who was found guilty of knowingly disposing looted goods “even though [according to the Court] he apparently did not share the intent of the Nazi perpetrators and in all likelihood found their actions ‘repugnant.’”\textsuperscript{263}

Unfortunately, Judge Scheindlin’s correct application of international law is now considered bad law thanks to the Second Circuit’s decision in \textit{Talisman Energy}, which held that “international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct.”\textsuperscript{264} Recognizing that in \textit{Khulumani} the Second Circuit had “fractured as to the standard for pleading [aiding and abetting] liability,” Chief Judge Dennis Jacobs held that “under international law, a claimant must show that the

\begin{footnotesize}
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\item \textsuperscript{262} In re S. African Apartheid Litig., 617 F. Supp. 2d at 260. See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 545 (Sept. 2, 1998) (“[A]n accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”).
\item \textsuperscript{263} Keitner, supra note 55, at 91 (citing 14 T.W.C., supra note 71, 620).
\item \textsuperscript{264} Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 259 (2d. Cir. 2009).
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defendant provided substantial assistance with the purpose of facilitating the alleged offenses." Although the Sudanese government violated customary international law, there was "no evidence that Talisman acted with the purpose to support the Government's offenses." Judge Jacobs asserted that the "purpose standard has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard." This too is false.

The ad hoc tribunals established for Rwanda and the Former Yugoslavia during the 1990s have consistently applied the Nuremberg knowledge standard. In Furundžija, the Trial Chamber held that "it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime." Awareness of the crime would suffice. The Trial Chamber set out the "legal ingredients" for aiding and abetting in international criminal law as mens rea that is "knowledge that these acts assist the commission of the offence." These standards were reiterated in Vasiljević where the Trial Chamber underscored that while the "aider and abettor must be aware of the essential elements of the crime" he "need not share the intent of the principal offender." The ad hoc tribunals regarded the norm against aiding and abetting as a substantive part of international law. One important case held that "prosecutions following the Second World War confirm" that the "concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting . . . has a basis in customary international law." In Khulumani, Judge Katzmann argued that "those

265. Id. at 247.
266. Id. at 263.
267. Id. at 259.
268. Prosecutor v. Furundžija, Case No. IT-95-17/1-T Trial Chamber Judgment ¶ 245 (Dec. 10, 1998) ("[T]he clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.").
269. Id. ¶ 235 (adding, for example "in the Einsatzgruppen case knowledge, rather than intent, was held to be the requisite mental element. The same position was taken in Zyklon B where the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees.").
270. Id. ¶¶ 249, 252.
272. Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Judgment, ¶
who assist in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability under the statutes governing the ICTY and ICTR.”

While this is correct, it is also misleading. These tribunals have also repeatedly held those who knowingly aid and abet the commission of a crime liable. The *mens rea* for aiding and abetting under customary international law is not the purpose standard, as Judge Katzmann claims. Federal courts have had no trouble applying the correct international standard. Citing *Furundžija*, Judge Pregerson correctly held in *Unocal* that “it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime,” but merely that the defendant “is aware that one of a number of crimes will probably be committed.”

In choosing to rely on the Rome Statute, Judge Jacobs not only applied the wrong body of international law, but he did so incorrectly. The Rome Statute does not unequivocally adopt the purpose standard for all forms of aiding and abetting. Article 25(d) sanctions a person who “[i]n any other way contributes to the commission or attempted commission of . . . a crime by a group of persons acting with a common purpose” if it is “made with the aim of furthering the criminal activity or criminal purpose” or “the knowledge of the intention of the group to commit the crime.” Professor Andrew Clapham has persuasively argued that “no ‘purpose’ is required by the person assisting. The Statute simply requires ‘knowledge of the intention of the group.’” Indeed, the “absence of practice based on the 25(3)(c) assistance test” points courts to the standards of customary international law as they were clarified at Nuremberg and by the ICTY and ICTR ad hoc tribunals.

Not surprisingly, the most exemplary application of

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666 (May 7, 1997).
274. *Id.* at 277.
275. *Doe v. Unocal Corp.*, 395 F.3d 932, 950, 956 (9th Cir. 2002).
278. *Id.*
international law can be found in Judge Scheindlin's opinion for *Apartheid Litigation*. Noting that the Second Circuit court in *Khulumani* had "left this court without a standard to apply or even a decision concerning the source of law from which this court should derive a standard," Judge Scheindlin correctly stated that international law "requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations." The requirement is mere knowledge, and the firms in question simply had to know that their products would be used for human rights violations for liability to attach.

Several district courts have incorrectly applied the more stringent Rome Statute standard and will continue to do so until the Supreme Court clarifies the binding nature of the customary international law standard. Similarly, courts will continue to disagree about whether private individuals can be liable under international law, ignoring the fact that the Alien Tort Statute was created specifically to deal with private liability.

V. THE MISSED OPPORTUNITY: PFIZER V. ABDULLAHI

*Pfizer v. Abdullahi* would have served as an excellent point of entry to the question of corporate liability under the Alien Tort Statute. Unlike most other cases, it did not appear to implicate state action and it was therefore unencumbered by the controversial ancillary debates over the political

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280. *Id.* at 262.


283. See *supra* notes 227–30 and accompanying text.
question doctrine and state immunity. Had the Court granted certiorari, it would have also been able to address which body of law governs corporate aiding and abetting liability. In short, the Court would have had the opportunity to address all of the core issues analyzed in this Article: corporate liability, jurisdictional compatibility, and the source of substantive law for aiding and abetting liability. Since the Court will return to these recurring issues in future cases, it is worth examining closely the arguments made in the certiorari briefs.

In 1996, the Nigerian city of Kano was plagued by an epidemic of bacterial meningitis that would eventually kill over twelve thousand people. Pfizer took advantage of this tragedy and conducted a large-scale study of an experimental antibiotic, Trovan, on some of the sick children. It allegedly acted without obtaining informed consent from guardians, modifying treatments when conditions worsened, or disclosing the immediate availability of proven and effective treatment from Médecins sans Frontières at the same hospital.\(^\text{284}\) According to the plaintiffs, “the tests caused the deaths of eleven children, five of whom had taken Trovan and six of whom had taken the lowered dose of ceftriaxone, and left many others blind, deaf, paralyzed, or brain-damaged.”\(^\text{285}\) The Nigerian government allegedly facilitated this test by granting Pfizer control over two wards in the Infectious Disease Hospital in Kano and the right to import Trovan into the country.\(^\text{286}\) An exposé of the tests was ultimately published in the Washington Post.\(^\text{287}\) Shortly thereafter, families of the victims filed several claims under the ATS against Pfizer. Most of these claims were dismissed for lack of subject matter jurisdiction under the ATS and on the ground of \textit{forum non conveniens}.\(^\text{288}\) On July 12, 2007, however, a consolidated appeal of these cases from the


\(^{285}\) Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009). The plaintiffs alleged that subjects received only one-third of the recommended dose of the control drug ceftriaxone in order to make Trovan seem more effective. \textit{Id.} at 188.

\(^{286}\) \textit{Id.} at 188.


\(^{288}\) Abdullahi, 562 F.3d at 170.
Southern District of New York made it before the Second Circuit. The plaintiffs alleged that Pfizer had violated customary international law. Failure to obtain informed consent is a breach of the Nuremberg Code and several postwar treaties. The Second Circuit held that nonconsensual human medical experimentation violates a specific and universal norm of customary international law that can be enforced through the ATS. In short, the Nuremberg Code satisfied the requirements set out in Sosa for a norm that is actionable under the Alien Tort Statute.

Pfizer appealed to the Supreme Court in a brief authored by Professor Kathleen Sullivan. In the petition for certiorari, Professor Sullivan argued that there “is no general international common law of torts” and the only way to establish subject matter jurisdiction under the ATS for a violation of international law is by showing that “a private corporation or individual . . . acted under color of law or in concert with a foreign government.” Sullivan claimed a circuit split existed regarding state action and that the Second Circuit incorrectly allowed plaintiffs “to proceed with their ATS claims despite their failure to allege that the Nigerian government knew of or participated in the specific conduct by Pfizer that is claimed to violate international law.” This claim was controversial because, to date, no federal court has recognized a circuit split on the subject. Next, she cited the Ninth Circuit decision in Abagninin, 

289. Id. at 168.
290. Id. at 170.
292. Abdullahi, 562 F.3d at 169.
293. Id. at 184–85. The Court endorsed the conclusions of the American tribunal that tried Nazi doctors: “the American tribunal's conclusion that action that contravened the Code's first principle constituted a crime against humanity is a lucid indication of the international legal significance of the prohibition on nonconsensual medical experimentation.” Id. at 179. Medical atrocities also constitute war crimes when committed during war.
295. Id. at 12–13. On the limited color of law requirement see supra note 55.
296. Id. at 14.
which employed a heightened state action requirement.\footnote{Id. at 16.} Thus, Sullivan exploited the misapplication of the Rome Statute in that case to allege a circuit split.\footnote{Id. at 19. But see Brief of the United States as Amicus Curiae at 12, Pfizer, Inc. v. Abdullahi, 130 S. Ct. 3541 (2009) (No. 09-34), 2009 WL 2173302 (noting that “the Ninth Circuit's state-action discussion in Abagninin was not a general conclusion that any ATS claim must satisfy a state 'plan-or-policy test'”).} Finally, with a creative use of ellipsis Sullivan argued that “[b]ecause the law of nations typically binds nation states, not private actors, ATS jurisdiction must be especially sparing when ‘the perpetrator being sued . . . is a private actor such as a corporation or individual.’”\footnote{Petition for Writ of Certiorari, supra note 294, at 20 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).} Sullivan’s claim about the law of nations finds no support in footnote twenty or any other part of the Sosa opinion. The remark appeared as dicta in a passage on the importance of the clear definition requirement. The majority simply noted that: “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”

Sullivan distinguished Pfizer v. Abdullahi from the Nuremberg-era Medical Case by noting that the latter’s conduct was intertwined with the government. The Second Circuit nonetheless “held that Pfizer is bound by the Nuremberg Code principle that ‘[t]he voluntary consent of the human subject is absolutely essential,’ even though that principle was announced as a result of criminal verdicts against state actors who were part of the governmental machinery of the Third Reich.”\footnote{Sosa, 542 U.S. at 732 n.20.} Opponents of ATS litigation point out that Pfizer’s drug testing in the midst of a health crisis with the support of the Nigerian government is dissimilar from the medical experiments committed by the Nazis on prisoners.\footnote{Petition for Writ of Certiorari, supra note 294, at 6.} While perhaps intuitively compelling, this criticism suffers from the fact that following Sosa, courts are supposed to look to the international norm, not the

\footnote{Letter from Professor Curtis A. Bradley to author (Dec. 30, 2009) (on file with author).}
precise fact pattern from which the norm emerged. The standard is encapsulated in the Nuremberg Code, rather than in characteristics of Nazi medical experiments. Courts should determine whether the Code refers purely to action taken in the furtherance of a war crime or to all medical experimentation on humans. Unfortunately, there is no clear answer to either of these questions.

The Plaintiffs replied in a brief authored by Professor Arthur Miller. He argued that there is no circuit split and that state action is not required under international law. The Second Circuit’s decision, he reasoned, “in no way expands the concept of state actor under the ATS.” With respect to the cause of action, Professor Miller noted “[t]here is no real question that nonconsensual medical experimentation violates specifically defined international norms.” Not only is voluntary consent of the human subject “absolutely essential” but the “Nuremberg Code expressly emphasizes this principle’s applicability to private actors.” Indeed, the text explicitly states the “duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.” Even if this argument were to fail, Miller noted that the “[the lower courts] found that Respondents adequately pled that the Nigerian government and Pfizer were ‘joint participants’ in the Trovan experiment.” He concluded by reiterating that “state action is not required to sustain a claim under the

303. Sosa, 542 U.S. at 729; see also supra note 53.
305. Brief in Opposition, supra note 284, at 7, 12.
306. Id. at 9.
307. Id. at 1. Professor Miller stated that “Pfizer [did] not argue that consent was not required, but instead attempts to characterize its conduct as a mere technical failure in obtaining consent.” Id. (citing Petition for Writ of Certiorari, supra note 294, at 23). “Such mischaracterization obscures Pfizer’s violations of basic human rights principles governing that conduct, with or without the presence of state action.” Id.
308. Id. at 3 (citing United States v. Brandt (“The Medical Case”), in 2 T.W.C., supra note 71, at 181–82).
309. Id.
310. Id. at 7.
On May 28, 2010, the Solicitor General submitted a brief recommending a denial of certiorari. The government argued that the lower court did not depart in its ruling from any other circuit. The brief failed, however, to endorse Professor Miller’s primary reading of the decision. Instead, it argued that the Second Circuit allowed the plaintiff’s claims to proceed on the basis of the Nigerian government’s alleged participation in the Trovan test. It acknowledged that the Second Circuit “did not mention any allegation of specific knowledge on the part of the [Nigerian] government of the allegedly nonconsensual nature of the test.” Nevertheless, it argued that the majority in *Abdullahi v. Pfizer* “did not affirmatively hold that state action, or liability in actions under the ATS more generally, can be proved in the absence of such knowledge or participation in the alleged acts.” Suffice it to say that this was an exceedingly cautious reading of the decision. The Government concluded that no further review of the question was necessary because Pfizer did not challenge the Second Circuit’s conclusion that international law prohibits nonconsensual medical testing when there is state involvement and the Supreme Court should not be the first to decide whether the ATS allows a claim about nonconsensual medical testing in the absence of state action.

On June 29, 2010, following the advice of the Solicitor General, the Court denied certiorari and missed a prime opportunity to clarify the law.

311. Brief in Opposition, supra note 284, at 12 (“[T]his Court in Sosa clearly contemplated international norms reaching private actors . . . [i]ndeed Petitioner has not cited a single circuit court decision holding that state action is required to state a claim under the ATS. This is because there is no such requirement.”).
313. *Id.* at 10.
314. *Id.* at 11.
315. *Id.*
316. *Id.* at 14.
VI. THE TEST CASE: PRESBYTERIAN CHURCH OF SUDAN V. TALISMAN ENERGY

The Court's next opportunity to examine corporate aiding and abetting liability was Presbytery Church of Sudan v. Talisman Energy.\textsuperscript{318} The preliminary briefs suggested the Court would have had the opportunity to address all of the core issues analyzed in this Article: corporate liability, jurisdictional compatibility, and the source of substantive law for aiding and abetting liability.

In 1998, Talisman Energy entered into a joint venture with the government of Sudan to develop oil and gas reserves in its southern province.\textsuperscript{319} According to the plaintiffs, Talisman joined the venture with full knowledge that expanding oil production would involve military operations designed to remove the indigenous population and establish a "buffer zone."\textsuperscript{320} Talisman knew that these operations were an integral part of the joint venture and that its partners routinely coordinated their activities with the Sudanese military.\textsuperscript{321} For example, the helicopters and bombers used to attack the population were maintained and operated from two of the joint venture's airfields.\textsuperscript{322} On November 8, 2001, the Presbyterian Church of Sudan and named plaintiffs on behalf of the population of southern Sudan filed suit in the Southern District of New York.\textsuperscript{323} The plaintiffs alleged that Talisman aided and abetted the government of Sudan in the commission of war crimes, genocide, and crimes against humanity.\textsuperscript{324} They subsequently survived several motions to dismiss.\textsuperscript{325} In April 2006, however, after completing discovery, Talisman successfully moved for summary judgment.\textsuperscript{326} According to Presbyterian Church of Sudan,

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318. On October 4, 2010, the Court denied certiorari to both of the petitions discussed in this part of the Article. Since these questions will persist until they are resolved by the Court, these certiorari briefs are worth examining.
320. \textit{Id.} at 7.
321. \textit{Id.} at 7–8.
322. \textit{Id.} at 10.
323. \textit{Id.} at 10–11.
324. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 251 (2d Cir. 2009).
326. \textit{Id.}
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this was the first time the district court applied “a heightened mental element in its analysis of Talisman’s aiding and abetting liability.”

Presbyterian Church of Sudan appealed to the Second Circuit. Relying on the Rome Statute, the Second Circuit affirmed the lower court’s decision and held that the “mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.”

On April 15, 2010, Presbyterian Church of Sudan filed a petition for certiorari asking the Court to decide whether the Second Circuit misstated the law. Presbyterian Church of Sudan undertook a two pronged strategy. First, it challenged the Second Circuit ruling that international law governs the standard for aiding and abetting. Next, it posited that even if international law is the correct source for the standard, the Second Circuit “fundamentally misconstrued” international law. The first argument for certiorari was shaky; the second was ironclad.

Presbyterian Church of Sudan made all of the familiar arguments in favor of applying federal common law principles for aiding and abetting. As a result, the petition suffered from all of the problems associated with that approach. Presbyterian Church of Sudan argued that “international law itself counsels against looking for substantive international law complicity norms” but relied for support solely on the well-known adage that international law “leaves to each nation the task of defining the remedies that are available for international law violations.” The brief made no headway in explaining why courts should treat complicity as an ancillary question. Nor did it justify applying federal common law standards when exercising adjudicatory jurisdiction. Worse still, the circuit split alleged by the plaintiffs does not yet exist. Though there is widespread use

327.  Id.
328.  Presbyterian Church of Sudan, 582 F.3d at 259.
329.  Petition for Writ of Certiorari, supra note 319, at 2–3. The petition also raised a third question concerning conspiracy and joint criminal enterprise theories of liability.  Id. at 5.
330.  Id. at 4.
331.  Id.
332.  See supra Part IV.
334.  Compare id. at 23, with supra notes 239 and 246 and accompanying text.
335.  See supra notes 238–45 and accompanying text.
of the federal common law standard for aiding and abetting liability among district courts, no other circuit court has produced binding precedent determining the proper standard or the body of law from which such a standard is drawn. The only other court to have grappled with these questions had its decision vacated by the Ninth Circuit. That case was subsequently settled before the issue could be resolved. The opinions of Judges Pregerson and Reinhardt in *Unocal* therefore lack precedential value. Presbyterian Church of Sudan would have had to rely entirely on the second argument in order to obtain a grant of certiorari. The Court should have granted certiorari to ensure that federal courts correctly apply the proper standard for aiding and abetting as it exists in international law.

In its brief in opposition to certiorari, Talisman accused Presbyterian Church of Sudan of “advocating a promiscuous theory of secondary liability” that “attempts to lower Sosa’s bar.” Though it correctly identified the tenuous nature of the circuit split alleged by the plaintiffs, Talisman otherwise faltered in its analysis of the law. Initially, Talisman attempted to evade the second basis for certiorari by invoking Supreme Court Rule 10. The question before the Court, however, concerned the Second Circuit’s statement of the law, not its unique application to a certain set of facts. Thereafter, the brief adopted two main arguments.

First, Talisman defended the Second Circuit’s choice of standard as better entrenched in international law. Relying on Article 38 of the Statute of the International Court of

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337. Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari at 7 n.2, Presbyterian Church of Sudan, 78 U.S.L.W. 3463 (Apr. 15, 2010) (No. 09-1262). Talisman also argued that *Unocal* is irrelevant to this case because the majority held that the ATS required the application of international law to the question of aiding and abetting liability. *Id.* (citing *Unocal*, 395 F.3d at 948–49). This argument, however, sidesteps the very important fact that the Ninth Circuit applied customary international law as the basis for liability whereas the Second Circuit looked to the Rome Statute.
338. *See supra* Part IV.B.
340. *Id.*
341. *Id.* at 11 (citing SUP. CT. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.”)).
Justice, the brief argued that the decisions by the ad hoc tribunals relied on in *Unocal* are only secondary sources of law.\(^3\) It neglected to mention, however, that these tribunals relied exclusively on the only body of international law endorsed by *Sosa*, customary international law.\(^4\) In lieu of this body of law, the respondents referred to the Rome Statute and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.\(^4\) Neither source represents customary international law fully or exclusively. Nor is private liability barred by either of these instruments. To recapitulate: the Rome Statute expressly states that “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”\(^5\) As for the Draft Articles, Article 58 plainly states that the “articles are without prejudice to any question of the individual responsibility under international law.”\(^6\) The Second Circuit simply misstated the law.

Talisman’s second strategy involved a remarkably expansive interpretation of *Sosa*’s universality requirement. For example, toward the end of its brief, Talisman argued that “nowhere do petitioners, or the sources they cite, set forth the contours of what ‘knowledge’ means.”\(^7\) Talisman then speculated about whether the international standard refers to constructive or actual knowledge and concluded that “[i]n the absence of any specific definition, petitioners’ knowledge standard is insufficiently specific to permit a federal court to create a cause of action in ATS cases.”\(^8\) In fact, international courts have applied an encompassing definition, where it is sufficient to attach liability “if the

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\(^3\) Id. at 17.


\(^8\) Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari, *supra* note 337, at 20.
perpetrator has knowledge, either actual or constructive." Unfortunately, this was not an isolated misstatement of the law by Talisman, but part of a legal strategy designed to cast doubt on the applicability of international law wherever there is a wrinkle of complexity. Sometimes, as in this example, the object of doubt is well-settled international law. Elsewhere, the targets included matters that have been traditionally left by international law to domestic courts. At no point did Talisman identify a rule of international law that would require clarification in order for the litigation to proceed.

Underlying this legal strategy is a theory of Sosa that interprets the requirement of universality to apply to all of the elements of the trial. This theory is mistaken. Ever since they were introduced in Filártiga, the requirements of "clear definition" and "general assent of civilized nations" have only been applied to the international norm that provides the cause of action. Like Pfizer, Talisman tried to graft its own self-serving theory onto footnote twenty:

_Naturally_, the same rule that governs whether a claim exists under the ATS also governs how liability should be measured for such a claim. Again, this Court's ruling in _Sosa_ was _crystal clear_. The Court emphasized that its decision extended to the "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued._

Talisman's confidence about the incontrovertible meaning of _Sosa_ was unwarranted. Footnote twenty appeared in a passage on the importance of the clear definition requirement. The majority simply noted that:

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349. Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 659 (May 7, 1997).
350. Talisman's grasp of the ATS is illustrated by its reference to the Court's "narrow brightline rule of decision" in _Sosa_. Compare Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari, _supra_ note 337, at 6, _with Sosa_, 542 U.S. 692, 724–5 (2004). Scholars have made many claims about Sosa's clear definition standard but none have claimed that it is a bright-line rule. See _supra_ notes 43–54.
351. _See supra_ notes 53–54.
352. Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari, _supra_ note 337, at 6–7 (emphasis added) (citing _Sosa_, 542 U.S. at 732 n.20).
353. _See Sosa_, 542 U.S. at 732.
"[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." The Court then compared the change in consensus between *Tel-Oren v. Libyan Arab Republic* and *Kadic v. Karadžić* with respect to the question of private liability. Scholars have speculated about the effect of this footnote on corporate liability, but none have suggested that it extended the requirement of "general assent of civilized nations" to matters unrelated to the violated norm.

This legal strategy is equally apparent in Talisman’s Conditional Cross-Petition for Certiorari. Talisman claimed there is "no consensus among States that universal jurisdiction extends to aiding and abetting the commission of violations of even those international law norms over which States are expected to exercise universal criminal jurisdiction." *Sosa* does not require such consensus. Even if it did, there exists substantial evidence that the principle of conditional universal jurisdiction extends to aiding and abetting. The respondent also made much of the fact that “a 28-country survey carried out on Talisman Energy’s behalf . . . revealed not a single judicial decision recognizing such liability.” This ignores that the presence or absence of domestic legal practice does not necessarily give rise to a rule of customary international law. In any case, dozens of states have created legal mechanisms capable of holding corporations liable for violations of international law.

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354. *Id.* at 732 n.20.
359. *Id.* at 8.
360. *Id.* at 20.
361. *See supra* note 177.
362. *See supra* notes 201–07 and accompanying text.
law. Talisman thus misconstrued Sosa to require universal consensus on all matters of the trial, ignoring that fundamentally the ATS provides a domestic remedy for the violation of an international norm.

Finally, Talisman claimed that applying the knowledge standard for aiding and abetting would "severely and inappropriately impact international trade." Professor Jack Goldsmith made a similar argument in an amicus brief submitted on the behalf of the U.S. Chamber of Commerce in Pfizer. Part VII shows that concern about the harms of ATS litigation has been vastly exaggerated.

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365. See supra note 98 and accompanying text.
366. A small sample will have to suffice. As Jonathan Bush has demonstrated, charters exist granting an international tribunal jurisdiction over corporations. Compare supra note 65, with Conditional Cross-Petition for a Writ of Certiorari, supra note 358, at 12. Talisman invokes the well-known rule of international comity that states must cede jurisdiction to those with stronger claims but neglects to mention that this rule of deference is premised on the ability and willingness of these states to prosecute the violation of international law. Conditional Cross-Petition for a Writ of Certiorari, supra note 358, at 17. The respondent also argues that "universal jurisdiction requires that the adjudicating State have custody of the accused." Id. at 21. This presumably refers to the widespread presumption against universal jurisdiction in absentia. Here, the District Court established personal jurisdiction by piercing the corporate veil. See Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882 (DLC), 2004 WL 1920978, at *1–3 (S.D.N.Y. Aug. 27, 2004). Talisman argues that "there is no international consensus equating the concept of physical custody of a person with personal jurisdiction over a corporation based on its minimum contacts." Conditional Cross-Petition for a Writ of Certiorari, supra note 358, at 21. No such consensus is necessary.
367. Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari, supra note 337, at 21.
369. See infra Part VII. Critics charge that the application of international law to foreign corporations is imperialistic, places corporations with substantial ties to the U.S. at a disadvantage, and sidesteps the legislature. See Nathan Koppel, Arcane Law Brings Conflicts from Overseas to U.S. Courts, WALL ST. J. (Aug. 27, 2009), available at http://online.wsj.com/article/SB125133677355962497.html; Curtis A. Bradley & Jack L. Goldsmith, Rights Case Gone Wrong: Ruling Imperils Firms and U.S. Diplomacy, WASH. POST (Apr. 19, 2009), available at http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702869.html. First, calling modern international law imperialistic is a perversion of the English language. Imperialism is the failure to consistently apply the rule of law within territory under one's control, usually to the detriment of the colony or periphery. Legal imperialism, for example, is the failure to extend constitutional protections outside the metropole (e.g. Bagram Airbase) or accord indigenous insurgents their due rights under the laws of war. In contrast, what these critics seem to
VII. THE PROMISE OF CORPORATE AIDING AND ABETTING LIABILITY UNDER THE ATS

Judge-made rules are in a sense conditional, that is, they are subject to legislative or popular revision and hence are acceptable in a democracy.370

In Sosa, the Court announced that it would “welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.”371 Six years later, the legislature remains silent. It is now time for the Court to step forward and take on the role of common law adjudicator. Ignoring the problem posed by these emerging norms is not a viable solution.372

In the years since Filártiga, Congress has moved toward embracing Alien Tort Statute litigation as a form of accountability. In 1991, Congress passed the Torture Victim Protections Act which codified “an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law [as in Filártiga],373 section 1350 of the Judiciary Acts of 1789.”374 The drafters praised be arguing is that applying the basic and universal values which international law embodies to a handful of intractable dissenters is unjust and intolerable. In this sense, international law is, like all law, “imperialistic.” It embodies humanity’s preference for order and civilization over barbarism. What makes this sort of “imperialism” tolerable is that the norms in question command the “general assent of civilized nations.” Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004); Filártiga v. Peña-Irala, 630 F.2d 876, 881 (2d. Cir. 1980). Second, the United States routinely places corporations at a disadvantage. Third, some argue that decisions implicating policy tradeoffs should be left to Congress. Bradley, supra note 7, at 926. However, policy tradeoffs are inherent in all judicial decisions. Courts play a special role in our system of government when adjudicating issues of basic human rights because their decisions are principled. Finally, even under the Revisionist approach to post-Erie federal common law, Courts should be able to adjudicate these matters because “an interstitial creation of a cause of action against corporations for violations of the law of nations would effectuate congressional intent and be consistent with current federal policy.” Vora, supra note 237, at 219.

371. Sosa, 542 U.S. at 731.
373. The TVPA is interpreted to have codified the common law remedy in Filártiga. See Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104–105 (2d Cir. 2000); Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995).
the ATS and noted that “claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”

They reiterated that the Alien Tort Statute “should not be replaced.” Congress has consistently dismissed attempts to curtail the reach of the courts in this type of litigation, including Senator Dianne Feinstein’s proposed amendment in 2005 to limit the application of Alien Tort Statute to suits “asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort,” which died in committee.

Although Congress has been slow to heed Sosa’s call for “guidance in exercising jurisdiction with such obvious potential to affect foreign relations,” it has consistently acted to maintain the current system of redress. Meanwhile, with the notable exception of the George W. Bush administration, the executive branch has supported ATS litigation by filing amicus briefs under the Jimmy Carter, Ronald Reagan, George H. W. Bush, and Bill Clinton administrations. The current administration has not yet taken a stand on ATS litigation, but it will likely depart from the previous administration’s position.

375. Id.
376. Id.
379. Beth Stephens, Upsetting Checks and Balances: The Bush Administration’s Flawed Efforts to Limit Human Rights Litigation, 17 HARV. HUMAN RTS. J. 169, 169, 174 (2004). Under the Reagan administration the Justice Department was inconsistent in its approach to the ATS. On one hand it supported the decision in Filártiga. See Brief for the United States as Amicus Curiae at 19, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.D.C. 1984) (Nos. 81-1870, 81-1871). On the other hand, it later called for a narrower reading of ATS jurisdiction. See Brief for the United States as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (Nos. 86-2448, 86-15039).
380. President Obama has moved away from the previous administration’s position about when appellate review can be granted in ATS litigation and has appointed Harold Koh as Legal Advisor to the Department of State. Dean Koh is a major advocate of ATS litigation who once compared Filártiga to Brown v. Board of Education. See Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2366 (1991).
A. Local and Global Interests

The United States has an interest in adjudicating violations of international law in its courts. Not only does this practice confer legitimacy on the world stage but it also ensures that the United States government can express its policy by filing a statement of interest, to which the court will accord deference. Indeed, for this very reason, opponents of ATS litigation may soon become its fiercest champions as foreign courts increasingly extend liability for human rights abuses to American corporations. Additionally, the Sosa system may also play an important but underexplored structural role in our system of government.

In Sosa, the Court noted that “it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.” As early as 1980, the United States government concluded that “a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation’s commitment to the


383. The ATS ensures the timely adoption of basic international legal standards, strengthens our system of participatory adversarialism, and protects the separation of powers. Though our form of government has continued its slide into quasi-parliamentarianism, Congress is still notoriously slow in adopting basic international legal standards into its legislation. The federal courts play an interstitial role by anticipating long-term changes in our body of law. The ATS also embodies the strongly embedded principle of private enforcement. It allows victim participation to an extent that would not be possible in a system where the government had prosecutorial discretion. Finally, the ATS owes its legitimacy to the structural independence of our courts.

protection of human rights.” This desire to advance our nation’s commitment to the most basic customs of human rights law is equally evident on the Supreme Court. In 2001, Justice Sandra Day O’Connor eloquently noted that although “American judges are becoming more aware of their responsibilities to respect not only domestic law but also the law of nations . . . more effort is needed.” In Roper v. Simmons, O’Connor pointed out that “the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” Justice Anthony Kennedy has emerged as the most outspoken advocate for strengthening global rule of law and defending international standards of decency. More recently, Justice Ruth Bader Ginsburg emphasized that “the U.S. judicial system will be the poorer . . . if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.” The Alien Tort Statute litigation plays an important institutional role in protecting the global rule of law and enforcing customary international law.

390. Numerous foreign jurists have echoed this conclusion. For example, Canadian Supreme Court Justice Ian Binnie recently argued that if ATS “legislation were replicated in more countries, there would be more avenues whereby companies could clear their names of allegations made against them, or complainants could obtain redress, depending on what the evidence shows.” Cristin Schmitz, Binnie Calls for Corporate Accountability, LAWYERS WKLY. Aug. 29, 2008, available at http://www.lawyersweekly.ca/index.php?section=article&articleid=745. Olivier Dutheillet de Lamothé of the French Conseil Constitutionnel has similarly endorsed the ATS. See Curran, supra note 98, at 381.
B. Robust Structural Safeguards

Concerns about the potential harms stemming from the Alien Tort Statute ignore the robust structural safeguards of our federal courts. Plaintiffs must still pass through a veritable obstacle course of civil procedure that eliminates all but the most firmly grounded cases. Fortunately, the courts have become increasingly vigilant about the application of these safeguards. In reviewing the political question doctrine in Khulumani, the Second Circuit rejected the notion that

even an appellate court, sitting in review—must dismiss a case when the executive branch, through a State Department Statement of Interest or other document, deems a case to be a political "irritant." This is not so. Mere executive fiat cannot control the disposition of a case before a federal court. Our principle of separation of powers not only counsels the judiciary to conduct an independent inquiry—it requires us to do so.

This conclusion has been echoed by the Ninth Circuit, which held in Sarei v. Rio Tinto that "it is our responsibility to determine whether a political question is present, rather than dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding." Even the otherwise controversial decision in Ibrahim v. Titan Corp. recognized that "an action for damages arising from the acts of private [military] contractors and not seeking injunctive relief does not involve the courts in 'overseeing the conduct of foreign policy or the use and disposition of military

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391. See generally, K. Lee Boyd, Universal Jurisdiction and Structural Reasonableness, 40 Tex. Int'l L.J. 1, 45 (2004) ("[T]he current structure of human rights litigation in the United States makes it virtually impossible that exercising universal jurisdiction in this country will have any detrimental 'collateral consequences' to foreign relations, to foreign policy, or to the sacrosanct separation of powers.").


393. Sarei v. Rio Tinto, 456 F.3d 1969, 1081 (9th Cir. 2008).

394. 391 F. Supp. 2d 10, 15–16 (D.D.C. 2005) (holding that "actions of a type that both violate clear United States policy and have led to recent high profile court martial proceedings against United States soldiers" are justiciable). The court erred when it dismissed all claims for failure to allege state action. Id. at 14–15. The plaintiffs should not have been required to show state action because the universal prohibition on war crimes applies directly to individuals. See Romero v. Drummond Co. Inc., 552 F.3d 1303, 1316 (11th Cir. 2008); Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995).
Similar vigilance is discernable with regard to the application of the state secrets doctrine in an ATS case involving corporate liability for rendition. In *Mohamed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit explained that by “excising secret evidence on an item-by-item basis, rather than foreclosing litigation altogether at the outset” the reigning case “recognizes that the Executive’s national security prerogatives are not the only weighty constitutional values at stake.” The state secrets privilege is not absolute and “cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence.” The Ninth Circuit blasted the lower court’s “sweeping characterization” of the state privilege and “the government’s theory” by which “the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.”

The state secrets doctrine is not categorical.

The courts have also made advances in their application of the *forum non conveniens* and exhaustion requirements. The judiciary has begun to recognize exhaustion of local remedies as a necessary prerequisite to ATS standing. Significantly, however, the court that mandated this requirement for all Alien Tort Statute litigation acknowledged that “courts have avoided the issue by finding that even if exhaustion were to apply to the [ATS], local remedies would in those cases be futile and therefore need not be exhausted.” As even the D.C. Circuit recently acknowledged, it’s “either this court or nothing.”


397. *Id.* at 1005.

398. *Id.* at 1003.


Recalling Judge Calabresi's argument that judge-made rules "are subject to legislative or popular revision," there exists one final safeguard to overreaching ATS litigation. If the courts were to ever overstep their mandate, Congress could always nip the problem in the bud by amending section 1350. Although Congress normally faces significant resource constraints in mobilizing to overturn decisions, the countervailing influence of powerful corporate lobbies eliminates this problem. Yet despite the force of this influence, Congress has done nothing to extinguish the ATS. Instead, it has pushed for greater corporate accountability. For example, Congress debated proposals calling for an even more stringent regime of global corporate accountability in the wake of revelations that Yahoo! collaborated with the Chinese government to catch and imprison dissidents. One cannot help but conclude that much of the criticism of the ATS is overheated and groundless. The promise of the Alien Tort Statute, on the other hand, is very real.

CONCLUSION

This Article has sought to illuminate the limits imposed by customary international law and the Supreme Court's decision in Sosa on the federal courts regarding corporate aiding and abetting liability. In mapping out the reach of these courts, this Article has purposely avoided advancing a certain vision of the Alien Tort Statute beyond the basic interstitial theory endorsed by the Supreme Court. The virtue of this approach is to have defined the realm of the possible, as it currently exists in law. Corporations may be held liable under the Alien Tort Statute. Corporate liability under ATS does not conflict with customary international law. Federal courts should apply customary international law when adjudicating alien tort claims against corporations arising under the aiding and abetting theory of liability. The

402. CALABRESI, supra note 370, at 92.
403. Yahoo Criticized in Case of Jailed Dissident, N.Y. TIMES, Nov. 7, 2007, at C3; Press Release, Representative Christopher H. Smith, House of Representatives, Smith Reintroduces the Global Online Freedom Act (Jan. 8, 2007) ("American companies should not be working hand-in-glove with dictators. By blocking access to information and providing secret police with the technology to monitor dissidents, American IT companies are knowingly—and willingly—enabling the oppression of millions of people.").
background principles—“the secret root from which the law draws all the juices of life”404—of customary international law and ATS jurisprudence suggest that corporate aiding and abetting liability should exist.

404. Holmes, supra note 1, at 35.